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Supreme Court of the United States

OCTOBER TERM, 1956.

No. 663

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, CALIFORNIA CITRUS LEAGUE, WESTERN GROWERS ASSOCIATION, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ARMOUR AND COMPANY, ET AL., *Appellees*.

Appeal from the United States District Court for the Northern District of Florida.

STATEMENT AS TO JURISDICTION.

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FLORIDA CITRUS COMMISSION, ET AL., *Appellants,*

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STATEMENT AS TO JURISDICTION.

Florida Citrus Commission, Growers and Shippers League of Florida, Florida Canners Association, Florida Citrus Mutual, Florida Fruit and Vegetable Association, Chase and Company, A. Duda & Sons Coop. Association, Florida Railroad and Public Utilities Commission, California Citrus League, and Western Growers Association, Appellants, submit this jurisdictional statement in compliance with Rule 15 and paragraph 2 of Rule 13 of the Revised Rules of the Supreme Court of the United States.

(a) OPINION DELIVERED IN THE COURT BELOW.

The opinion of Circuit Judge Jones, with which District Judge Barker concurred, and the special concurring opinion of District Judge DeVane, rendered on September 7th, 1956, in the United States District Court for the Northern District of Florida, Tallahassee Division, No. 565, wherein Florida Citrus Commission, et al., were plaintiffs, Ezra Taft Benson, Secretary of Agriculture, et al., were intervening plaintiffs, and United States of America, et al., were named defendants, and Atchison, Topeka and Santa Fe Railway Company, et al., were intervening defendants, have been printed in 144 F. Supp., pages 517 to 528. A copy thereof is appended hereto as Appendix I.

Likewise, a copy of the Report of the Interstate Commerce Commission, dated January 9, 1956, in Docket No. 31342, Proposed Increased Refrigeration Charges, 297 I.C.C. 505, is appended hereto as Appendix II; the order of the Commission, sought to be enjoined, annulled and set aside in the lower Court, having been rendered pursuant to said Report of the Commission.

(b) GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) Nature of Proceeding, and Statutory Provisions.

This Appeal is from the final decree of a three-Judge District Court dismissing the complaint which sought to enjoin, annul and set aside an order of the Interstate Commerce Commission.

The complaint in the court below was one to enjoin, annul and set aside an order of the Interstate Commerce Commission, entered by it pursuant to the Report in Docket No. 31342, Proposed Increased

Refrigeration Charges, 297 I.C.C. 505; and was filed under the provisions of Title 28, United States Code, Sections 1336, 1337, 1398, 2321, 2322, 2323, 2324, 2325 and 2284.

(ii) Dates of Decree and Notice of Appeal.

The final order of the three-Judge District Court denying the relief sought by the plaintiffs (and intervening plaintiffs) and dismissing the complaint, was dated and entered on September 7th, 1956, at Tallahassee, Florida, in the United States District Court for the Northern District of Florida, Tallahassee Division.

The Notice of Appeal herein was filed in said United States District Court for the Northern District of Florida, at Tallahassee, Florida, on November 5th, 1956.

(iii) Statutory Provision Conferring Jurisdiction of This Appeal.

The jurisdiction of the Supreme Court to review the final decree of the three-Judge District Court of the Northern District of Florida, by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

(iv) Cases Sustaining Jurisdiction.

The jurisdiction of the Supreme Court to review, on appeal, the final decree of the District Court, is sustained by many cases, including the following:

Louisville & Nashville Railroad Company, et al. v. *United States, et al.*, 242 U.S. 60, 61 L. ed. 152, 37 S. Ct. 61.

North Carolina v. *United States,* 325 U.S. 507, 89 L. ed. 1760, 65 S. Ct. 1260.

United States v. *United States Smelting, Refining & Mining Co.,* 339 U.S. 186, 94 L. ed. 750, 70 S. Ct. 537.

Secretary of Agriculture v. *United States,* 347 U.S. 645, 98 L. ed. 1015, 74 S. Ct. 826.

Interstate Commerce Commission v. *Mechling,* 330 U.S. 567, 91 L. ed. 1102, 67 S. Ct. 894.

Frozen Food Express v. *United States,* U.S. , 100 L. ed. (advance sheet 500), S. Ct. .

(c) QUESTIONS PRESENTED BY APPEAL.

The threshold question presented by this appeal is whether the statutory three-Judge District Court erred in refusing to consider the merits of the case, and, acting on its erroneous view that there was no justiciable issue, in dismissing the complaint.

Stated another way, may parties, aggrieved by increased refrigeration charges, maintain in the District Court (pursuant to Title 28, United States Code, Sections 1336, 2325) an action to enjoin, annul and set aside the final order of the Interstate Commerce Commission approving and authorizing the increased charges, when the order was entered in an investigation concerning the lawfulness of proposed increased charges for such accessorial service, is based on its Report containing certain findings, and (a) authorizes the approved increased charges and (b) modifies outstanding orders so as to permit the approved increases to be made effective.

Subsidiary questions include:

(1) Whether the findings of the Commission, taken as a whole, support the statements of the District Court that "the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided."

(2) Whether the case is "governed by the doctrines of the general revenue cases," thereby depriving plaintiffs of their right to judicial review, or whether the order is one which the Court should set aside on a complaint showing no lawful basis therefor.

(3) Whether the plaintiffs mistook their remedy by appealing to the Court to set aside the Commission's order, instead of filing a futile additional complaint with the Commission under Sections 13 and 15 of the Interstate Commerce Act seeking a determination of what is determined in the Commission's Report.

Questions, on the merits, presented by the complaint to the District Court, and involved here, include:

(1) Whether the Interstate Commerce Commission has the power to approve and authorize, or exceeded its power in approving and authorizing, a uniform nation-wide 15 percent increase in all charges for refrigeration services, despite findings in the Report, and undisputed evidence, that some existing charges were greater than cost plus a fair return, other charges were above or below cost by widely varying amounts, and some charges returned a very small part of the cost of performing the service.

(2) Whether the Commission could approve and authorize an increase in certain charges (on traffic estimated in the Report to constitute 43 percent of the

total) in the absence of any evidence or findings with respect to the cost thereof, although all refrigeration charges are based on cost.

(3) Whether the Commission was empowered to authorize increases in certain charges, which are shown by the evidence and by the findings in the Report, to be in excess of what the Commission found to be cost plus a fair return.

(4) Whether the Commission's order is supported by evidence and findings, when the Report shows that its conclusion is based on a "traffic study" which, the Report states (297 ICC 521), "afforded no mathematical chance for all of the railroads, all origin and destination areas, and all of the affected traffic to be included, and may have rendered it unrepresentative as to the whole body of traffic."

(5) Whether unlawful discrimination, contrary to sections 2 and 3 of the Interstate Commerce Act, exists or is created by a uniform percentage increase in all refrigeration charges, although "section 4" charges (on fresh meats and packing house products) are published for only three elements of cost, and "section 2" charges (on fresh fruits and vegetables) are based on as many as nine elements of cost.

(6) Whether there was any actual determination of costs by the Commission, sufficient to support findings and authorize any increase in individual rates and charges.

(d) STATEMENT OF THE CASE.

Refrigeration or icing service is transportation. It is wholly impracticable to include in the line-haul rates specific amounts to cover refrigeration costs.

Therefore, refrigeration charges, separate and distinct from and in addition to line-haul rates, are published in the Perishable Protective Tariff, Agent W. T. Jamison's ICC No. 31.[1]

Section 2 of the Perishable Protective Tariff states refrigeration charges applicable generally for refrigeration services in connection with the movement of fresh fruits and vegetables, while the charges provided in section 4 of the tariff embrace all other commodities such as fresh meats and packing house products. The term "section 2 charges" frequently is used to indicate the charges in section 2 of the tariff, and "section 4" refers to section 4 of the tariff.[2]

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[1] 49 USCA sec. 1(3)(a): "* * * The term 'transportation' as used in this part shall include * * * refrigeration or icing * * *."

49 USCA sec. 6(1): "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation * * *. The schedules printed as aforesaid by any such common carrier * * * shall also state separately * * * icing charges, and all other charges which the Commission may require, * * *."

Docket No. 20769, Charges for Protective Service to Perishable Freight, 215 ICC 684, 696: "It is wholly impracticable to include in line-haul rates specific amounts to cover refrigeration costs. The identity of whatever amount that might in the first instance be included in a line-haul rate to cover refrigeration service would sooner or later be lost in the inevitable readjustments to which line-haul rates are subject. Doubtless this has occurred to a greater or lesser extent wherever an attempt has been made to so handle such costs in the past, with consequent loss to the carriers and undue advantage to shippers who have used section 4 service as compared with shippers who were under the necessity of using section 2 service."

[2] In Perishable Freight Investigation, 56 ICC 449, it was shown that there were two general methods of charging for icing service, (1) the "stated-charge" method (or section 2 charges), and (2) the "cost-of-ice" method (or section 4 charges). "Under the former, the carrier undertakes for a stated charge to render such service from point of origin to destination; under the latter, to furnish at a published charge per ton whatever quantity of ice may be directed by the shipper." (151 ICC 651).

In Docket 17936, Refrigeration Charges on Fruits, etc., from the South, ICC 649, decided February 12, 1929, the Interstate Commerce Commission found unreasonable, refrigeration charges from southern origins to destinations in trunk-line and New England territories "after detailed investigation of the cost of the service to which they apply;" and therein found that the charges for standard refrigeration "are and for the future will be unreasonable to the extent that they exceed, or may exceed" specified levels. An order was entered that the carriers cease and desist, and abstain from publishing, demanding or collecting "charges which exceed, or may exceed," those prescribed as maximum.[3]

In Docket 20769, Charges for Protective Service to Perishable Freight, 215 ICC 684, decided June 2, 1936, the Commission determined and set forth the cost of the several elements entering into the furnishing of refrigeration service throughout the country. Also, reasonable maximum charges for standard refrigeration and for certain modified services (section 2) were prescribed from Arizona and California origins; and it was further ordered that the carriers establish, maintain and apply charges under Section 4 "to cover the cost of ice placed in the bunkers of refrigerator cars, the cost of switching refrigerator cars to and from ice docks, the cost of supervision, the cost of station and auditors

[3] "Standard service contemplates initial icing to bunker capacity at point of origin and reicing to capacity at regular icing stations en route." (151 ICC 652).

accounting, the cost of bunker repairs, and the cost of ice haulage.'"[4]

In Docket 28994, Half Stage Refrigeration Service, 256 ICC 213, decided August 31, 1943, the Commission prescribed maximum charges for half-stage refrigeration (section 2) and ordered that such charges for the future should not exceed 78 percent of the corresponding charges maintained for full-tank refrigeration.[5]

Docket No. 31342, Proposed Increased Refrigeration Charges, 297 ICC 505, was decided January 9, 1956,

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[4] Modified section 2 services for which charges were prescribed in Docket 20769 included:

Rule 240: Initially iced, do not re-ice.
Rule 242: Top or body icing service (ice supplied by shippers).
Rule 245: Citrus fruits, precooled and pre-iced, either by shipper or carrier, do not re-ice or re-iced once by carrier—varying charges dependent upon service.
Rule 249: Citrus fruits, initially iced by shipper or carrier, re-iced, once by carrier—varying charges dependent upon service.
Rule 247: Deciduous fruits or vegetables, initially iced by shipper or carrier, re-iced once by carrier—varying charges dependent upon commodity and upon service.

[5] Dockets 17936, 20769 and 28994 are the three proceedings named in the carriers' petition in Docket 31342, page 2 thereof: "The charges contained in the aforesaid Sections (2 and 4) of said Tariff include those prescribed by the Commission in Docket 17936, Refrigeration Charges on Fruits, etc., from the South, 151 ICC 649 (February 12, 1929), affirmed 172 ICC 3 (February 3, 1931), Docket 20769, Charges for Protective Service to Perishable Freight, 215 ICC 684 (June 2, 1936) as subsequently modified by the Commission's Order of October 1, 1940, 241 ICC 503, and reaffirmed by the Commission's Order of September 8, 1942, 253 ICC 351, and Docket 28994, Half-Stage Refrigeration Service, 256 ICC 213 (August 31, 1943)." It is further shown that two 15% increases were authorized under Ex Parte 162, Increased Railway Rates, Fares and Charges, 1946, 266 ICC 537, and under Ex Parte 166, Increased Freight Rates, 1947, 270 ICC 403. The Commission denied further increases in refrigeration charges sought by the carriers in Ex Parte 168, Increased Freight Rates, 1948, 276 ICC 9, Ex Parte 175, Increased Freight Rates, 1951, 284 ICC 589, and Ex Parte 196, Increased Freight Rates, 1956, 298 ICC 279.

but the report was not served on the parties until January 30, 1956. The order therein makes the report a part of the order, and orders that:

> "increases in refrigeration charges, to the extent authorized in the report of this date, may be made effective upon not less than 30 days' notice to the Commission and to the general public by filing and posting in the manner prescribed in the Interstate Commerce Act;
>
> "outstanding unexpired orders in other proceedings are hereby modified so as to permit the establishment of the increases in refrigeration charges herein authorized;
>
> and
>
> "all tariff schedules changing charges under the authority of this order, which charges are now maintained or held in force by virtue of outstanding orders of the Commission, shall make specific reference to this order."

Docket No. 31342 was initiated by a petition of the railroads that the Interstate Commerce Commission "institute an investigation into the adequacy of railway refrigeration charges and (to) authorize Petitioners to increase such charges in the manner and to the extent set forth in Appendix II hereto." Generally, the proposal of the railroads was "to increase by 30 percent * * * the charges published in section 2 * * * and to increase by specified amounts the charges published in section 4 of the same tariff" (297 ICC 506). The prayer of the railroads' petition was that:

> "the Commission institute an investigation into the adequacy of the refrigeration charges;

"the Commission determine and find that the increased charges here proposed will be just and reasonable;

"the Commission modify its orders in Dockets Nos. 17936, 20769, and 28994 to the extent necessary to assure that the increased rates and charges will be made effective as proposed herein;

"the Commission grant such other and further relief as may be required in the premises."

After testimony, briefs, a proposed report by the Hearing Examiner, exceptions thereto and replies, and oral argument before the Commission, a report bearing date January 9, 1956, as aforesaid, was served. The report found "that an increase in the specified refrigeration charges in excess of 15 percent is not justified," that "the basic refrigeration charges may be increased as herein specified, and that the charges so increased will be just and reasonable for the future," and that "all the basic charges * * * may be increased 15 percent within and between all territories" (297 ICC 554).[6]

[6] Commissioner Clarke dissented as follows:

"I am opposed to a uniform increase of 15 percent on each and every rate or charge published in section 2 of the Perishable Protective Tariff as authorized by the majority. It is a well-established principle that charges for refrigeration service should cover the cost thereof, plus a fair return, but no more. All of the earlier refrigeration decisions proceeded upon the logical theory that precise charges, based on costs alone, would be required. That particular theory is abandoned, however, by the majority.

"It is my opinion that authorizing a flat percentage increase in charges for accessorial services, regardless of the results shown for particular commodities or particular classes of service, violates the basic precepts of reasonableness and lawfulness in the Interstate Commerce Act. It results in increasing charges which are already equal to or above total costs and overcharging certain commodities, or certain move-

As heretofore indicated, "the prescribed charges (for refrigeration service) were predicated on the determination that they should be sufficient to cover the cost thereof plus a fair return on the investment in facilities required for the performance of the services. Being accessorial to the basic line-haul service, these charges were prescribed as exact charges, necessary to cover the additional cost incurred by the carriers in performing the services." (297 ICC 506) Necessarily therefore, the entire report of the Commission in Docket 31342 deals primarily with the evidence relating to the costs of the various elements of service and their applicability to particular services. The Commission, in its report, made various findings as to the cost of the various

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ments, or certain types of service, in order that other commodities or other movements or other types of service may be moved at a loss.

"The majority states 'In the establishment of a structure of charges of national scope it is impracticable to accomplish uniformity in the relation to costs.' However, the present structure of charges, based on costs, is national in scope, and, as indicated, it covers numerous specific services, commodities, and origin and destination groups. The very cost figures submitted by the carriers and used in the report with certain adjustments, to show nation-wide revenues, costs, and losses, were initially compiled from more specific data which show separately the costs and revenues for a particular type of service from a selected origin group to a selected destination group on a particular commodity. If such data is not sufficiently complete to arrive at separate increases for each service, or each commodity, it is due entirely to the failure of the carriers to develop such data. To reward them for that failure by allowing a blanket increase, knowing that it will result in certain commodities and certain services bearing more than their fair share of the costs involved, seems incongruous.

"I would authorize increases only in those instances where it has been clearly shown that the charges do not cover the cost of rendering the services involved and then no more than the amount necessary to close the gap between the specific charges and the comparable costs."

elements,—the carriers' evidence as to cost of ice (297 ICC 527) and the Commission's restatement of the cost of ice (297 ICC 532), the cost of salt (297 ICC 532, 533), the cost of switching (297 ICC 533-535), the supervision cost (297 ICC 535-536), the haulage of ice cost factor (297 ICC 536-539), the damage to bunkers and bodies of refrigerator cars (297 ICC 539), station and auditors accounting cost (297 ICC 539, 540), hazard (297 ICC 541), precooling cost (297 ICC 541-543), and the Commission's restatement of the cost of rendition of certain section 2 services (297 ICC 543).[7]

It was not the purpose of the complaint before the District Court, nor of this appeal, to review in detail voluminous evidence bearing on each of the several elements of costs nor the findings of the Commission with respect thereto. On the other hand, as will be pointed out, there are serious departures from the standards of the Interstate Commerce Act in some of those specific findings, and the ultimate result is contrary to the lawful standards even if the costs of individual elements as found by the Commission be adopted.

There are two main differences between the section 4 and the section 2 refrigeration charges in the tariff. First, of course, charges under section 4 are made for the specific amounts of ice and salt placed by the

[7] "The elements of expense that enter into the cost of furnishing refrigeration services fall into the following groups: Cost of ice in bunkers; supervision; switching to and from icing stations; bunker repairs, repairs of damage to cars caused by top or body icing; haulage of ice in bunkers; station and auditor's accounting cost; hazard; taxes; return on investment in facilities devoted to the performance of refrigeration services; and cost of precooling." Note 2 at bottom of page 508 of 297 ICC.

carriers in the bunkers of cars as directed by the shippers—ice at the tariff charge per ton, salt at the tariff charge per hundred pounds, and switching at the tariff charge therefor per icing regardless of whether any switching was performed in the icing. On the other hand, the section 2 tariff charge is a "stated charge" for the entire refrigeration service, the amount of which depends upon (a) the commodity involved (i.e. whether citrus fruit, deciduous fruit, melons, vegetables, or frozen foods), (b) the origin, (c) the destination, and (d) the type of refrigeration service rendered, i.e. whether standard refrigeration, a modified service such as Rule 240 (initial icing by shipper, do not re-ice), or top-icing under Rule 242 (from the West) or Rule 243 (from the South).

Second, there is no refrigeration charge under section 4 of the tariff for any element of cost except ice, salt and switching—no charge being provided in the perishable protective tariff for supervision, station and auditors accounting, bunker repairs, or ice haulage (although required by the order in Docket 20769, 215 ICC 684, 798). On the other hand, section 2 charges cover all of the enumerated elements of expense that are applicable to the particular service.[8]

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[8] "The prescribed section 2 charges are predicated on those elements, which will be discussed hereinafter in more detail. The present section 4 charges include only the elements of ice, salt, and switching." (297 ICC 507).

"The section 2 charges, as noted, cover the several enumerated elements of expense, while the section 4 charges cover only the elements of ice, salt, and switching. The elements of expense for supervision, station and auditors accounting, and ice haulage, which are covered by the section 2 charges, but not included in the section 4 charges, amount to about 19 percent thereof." (297 ICC 523).

"After extensive investigations in the prior proceedings, we made definite determinations as to the costs of the several elements

As a preliminary to the filing of the petition in Docket 31342, the railroad traffic executives concluded that they would "conduct a comprehensive study of the costs of providing refrigeration service for the purpose of determining whether the revenue therefrom was sufficient to cover the entire cost of performing the service, plus a fair return on the investment in facilities devoted to the performance thereof" (297 ICC 509, 510). That study was divided into two parts, viz.: (1) "ascertaining the total costs of ice and salt for all perishable traffic," and (2) "the total costs for the complete refrigeration service rendered for a representative number of shipments accorded bunker re-icing service subject to the section 2 charges." (297 ICC 510).

As to the first study, i.e. costs of ice and salt, a total of 1,678 locations on 124 railroads were covered by the more than 2,000 reports of the carriers. The results, placed in evidence in the record before the Commission, are discussed on pages 524 to 532 as to "Cost of Ice," and on pages 532 and 533 as to "Cost of Salt."

No point herein has been made relative to the finding of the Commission as to "cost of salt," except that of the different conclusion reached with respect thereto as to section 4 charges, on the one hand, and section 2 charges on the other. The Commission

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of expense and required the establishment of charges accessorial to the line-haul rates to compensate those costs on both section 2 and section 4 traffic. The section 2 charges became effective and have been applied for many years, but because our order as to the section 4 charges for the elements stated was stayed temporarily by the United States District Court for the Northern District of Illinois, and was subsequently vacated, those charges never became effective." (297 ICC 524).

found the cost to be $1.04 per hundred pounds, and authorized an increase in the section 4 salt charges from 99¢ to $1.04. On the other hand, as to section 2, "when salt is supplied by the carrier in icing or reicing perishable shipments, it is subject to varying charges in addition to the stated refrigeration charge. The maximum addition is 50 percent of the stated charge for standard refrigeration, and lesser additions apply when less than the stated maximum of salt is used" (297 ICC 508). In other words, on the same evidence and the same findings as to cost of salt, the Commission authorized an increase from 99¢ to $1.04, or about 5 percent, for section 4 salt charges, and authorized an increase of 15 percent, or three times as great, on section 2 charges for salt.

Compilation of results of the reports of the carriers as to cost of ice at the individual stations is set forth by "groups" on page 527 of 297 ICC. Those "average costs" by "groups" were restated by the Commission and set forth in the table on page 532. The present tariff charges for groups 1, 4 and 10 respectively are $4.04, $5.49 and $6.28. The carriers' reported costs average in such groups was respectively $5.07, $5.71 and $7.16. The Commission's restated average cost per ton of ice in said groups respectively is $4.60, $5.69 and $6.96. The importance thereof to fruit and vegetable growers and shippers (Florida, California and Texas interests), is that group 1 includes California (less certain stations on Great Northern Railway Company and Southern Pacific Company, 297 ICC 597), group 4 is Florida, and group 10 includes Texas. The increase authorized uniformly throughout the United States was 15 per-

cent, despite the lower group average costs found by the Commission as above.

No point herein is here raised with respect to the amounts found proper by the Commission for switching, supervision, haulage of ice, supervision, damage to bunkers, station and auditors accounting cost, hazard, and precooling, except:

(1) As to switching, the Commission found (297 ICC 535): "The evidence presented is insufficient to permit a determination of accurate costs, prerequisite to the authorization of the specified charges proposed;" and then authorized an increase of 15 percent in the section 4 switching charges, and in restating the costs of section 2 bunker re-icing services used an increase of 146 percent in the switching factor.

(2) As to the other enumerated elements (which the Commission says amount to about 19 percent of the restated section 2 costs) which are not included at all for section 4 traffic, the issue has been continuously presented as to whether such factors (and increased factors as well) can lawfully be used in authorizing an increase in section 2 charges when in the same proceeding it is affirmatively shown and found by the Commission that none of the same elements (although applicable) are charged, nor any charges nor increased charges therefor proposed, against section 4 traffic.

(3) All of the elements of costs are not applicable to all section 2 services, and the applicable elements apply in varying degrees to the different services; yet the determination of the percentage of deficit used by the Commission in arriving at the authorized increase of 15 percent was derived from a use of a composite

of all factors applied to the sample section 2 bunker-reiced traffic.[9]

The second study of the carriers was for the purpose of ascertaining "the total costs for the complete refrigeration service rendered for a representative number of shipments accorded bunker re-icing services subject to the section 2 charges." It was the more difficult, for "the charges for the various (section 2) refrigeration services differ widely dependent upon the character of the service rendered" (297 ICC 508). Standard refrigeration service requires initial icing and re-icing by the carrier at all regular icing stations en route from origin to destination. "There are about six different sets of charges (for standard refrigeration) dependent partly upon the commodity involved." There are various types of modified section 2 services, initial icing by the shipper with no icing by the carrier, initial icing by the carrier with no re-icing in transit, pre-icing and replenishing by carrier with no re-icing in transit or with one, two or three re-icings in transit, top or body icing by the shipper, top or body re-icing in transit by the carrier, etc. (see 297 ICC 558). The tariff charges "for the several types of modified services * * * range from about 15 to 85 percent of the charge for standard

[9] An illustration of the varying amount of service, and the consequent variance of applicable cost factors is stated, 297 ICC 518, 519: "The 4 elements of cost of providing Rule 240 service, for example, are (haulage of ice), hazard, station and auditors accounting, and bunker repairs, whereas there are 9 elements of cost in bunker re-iced service."

Another illustration is the Rule 242 and Rule 243 top or body icing service, where the ice used in the body of the car i.e. on top of the lading in the car, is never placed therein by the carrier but is always furnished by the shipper at his own cost and therefore not covered by the "cost of ice" factor; and likewise a number of the other elements of cost do not apply to such section 2 service.

refrigeration between the same points, the lowest being for rule 242 service when 10,000 pounds of ice is used, and the highest applying in connection with shipments accorded rule 245 service with, for example, pre-cooling, pre-icing and replenishing by the carrier, and re-icing three times in transit" (297 ICC 508).

Accordingly, for the purpose of obtaining a sample approximating 10 percent of the "shipments accorded bunker re-icing service," the carriers selected "shipments in refrigerator cars having numbers terminating in the digit 5." (297 ICC 511). Such selected traffic sample embraced section 2 bunker-reiced shipments from selected origins to selected destinations. The sample "does not include any shipments moved under any of the various modified services, such as rule 240, where no bunker re-icing service was performed" (297 ICC 516).[10] Each of the bunker re-iced shipments in the traffic sample was then considered with respect to the revenue at existing tariff charges and with respect to costs determined in the following manner: The total number of tons of ice supplied in each State, the total number of icings, the miles of haul, the commodity hauled, and the average weight of ice hauled, were determined for each shipment. The "cost of ice" was developed by applying to the number of tons furnished in each State the average cost per ton for the "group" in which the State was located (not the average cost of ice at the icing station or even the average cost of ice per ton for the State where furnished). The "haulage of ice" factor was

[10] The Commission found: "The petitioners' study afforded no mathematical chance for all of the railroads, all origin and destination areas, and all of the affected traffic to be included, and may have rendered it unrepresentative as to the whole body of traffic." (297 ICC 523).

computed by applying the cost per ton-mile to the ton-miles developed from the average weight of ice hauled and the miles of haul. Switching and supervision costs were computed by applying the respective unit cost to the number of icings. The accounting, hazard and bunker repair factors (per trip) were then added to the switching, supervision, haulage of ice, and cost-of-ice expenses developed as aforesaid, to give the total computed costs of the particular refrigeration service.[11]

As has been noted heretofore, the purpose of the traffic study was to obtain "a sample approximating 10 percent of the shipments accorded *bunker re-icing service,*" etc. This purpose intentionally excluded all refrigeration services which did not fall within that category,—i.e. an exclusion of all services which did not require "bunker re-icing" by the carriers. In other words, no shipments on which top ice or initial

[11] The different results as to the "total cost of ice" used in a particular bunker re-iced service, derived from "group" average cost, State average cost, or average cost at the specific icing station where the ice was furnished, is astounding. For example, for ice furnished at Potomac Yard, Va., on all cars in the traffic study, the carriers used the "group 8" average of $7.03 per ton. The average cost for all ice furnished in the State of Virginia was shown to be $5.87 per ton. The average for ice furnished at Potomac Yard, Va., was only $4.83 per ton. Yet, all ice furnished in Virginia for the traffic sample shipments embraced in the Commission's "restatement of results of petitioners' cost data," (297 ICC 543), was computed at the restated group 8 average cost of $6.91 per ton (297 ICC 532). This great variance arises solely from the inclusion in "group 8" of ice costs from 19 States and the District of Columbia, ranging from an average of $5.46 in Rhode Island and $5.87 in Virginia to $11.13 in Mississippi, $13.06 in West Virginia, and $13.13 in New Hampshire. (Group 8 embraces Connecticut, Delaware, District of Columbia, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan (Southern Peninsula), Mississippi, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia).

ice only was furnished, either by the carrier or by the shipper, were included in the traffic study; and the Commission did not consider nor determine what were the costs of performing those non-bunker re-icing services, although the charges therefor were among those on which the Commission authorized the 15 percent increase. The importance of the initial ice and top ice shipments is shown by the record and by the report.[12]

Following the order of January 9, 1956, in Docket 31342, which approved and authorized the 15 percent increase in all refrigeration charges, the carriers filed Supplement 27 to Perishable Protective Tariff No. 16, Agent W. T. Jamison's ICC 31 (on March 12, 1956), publishing the full increase authorized to become effective on April 17, 1956. In accordance with the Commission's order, the tariff supplement bears the notation: "published in conformity with Order of the Interstate Commerce Commission in Docket No. 31342 of January 9, 1956."

On March 2, 1956, and prior to the effective date of the tariff, petitions for reconsideration were filed with the Commission. Under the Commission's Rules of Practice, replies to the Florida petition for recon-

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[12] "Some of the protestants object to the exclusion of rules 240, 242 and 243 shipments from the carriers' sample, laying particular emphasis on the large number of such shipments, as indicated by the table on page 512 hereof, which approximated 43 percent of the total. Such shipments are iced initially by the shipper and are not re-iced in transit. Therefore, the amount of service given them and the revenue therefrom are minor compared with bunker re-iced shipments." (297 ICC 518).

In the year of the traffic sample, there were 38,895 refrigerated shipments of Florida vegetables, of which 55.97% were either initially iced only under Rule 240 or top-iced by the shipper under Rule 243.

sideration, filed on March 2nd, were due on March 22nd. However, on or about March 13th, the attorneys for the Meat Packers requested an extension of time in which to make reply. The Commission granted the request, and postponed the time for reply to April 23rd, a date which was six days subsequent to the effective date of the tariff supplement stating the increased charges.

The only effective remedy available to the parties was a restraining order against the Commission's order and to annul and set that order aside. The exhibits filed with the District Court clearly show that a substantial volume of the fruits and vegetables grown in California and Florida are sold at origin on an f.o.b. origin sales price. The available f.o.b. origin prices reflect the destination prices less the current transportation charges (including refrigeration charges). The grower, who has sold the fruits or vegetables produced by him, on such a basis, receives a lesser amount than he would otherwise have received had the increased refrigeration charges not been in effect. Thereafter, he is helpless and cannot recover any reparations by a formal complaint to the Commission under the Interstate Commerce Act, for the person entitled to such reparations (if later the Commission finds the specific charges to be unjust and unreasonable) is the one who has paid the charges, viz.: the person to whom the grower has sold on an f.o.b. origin price basis. The subsequent award of reparations is therefore a "windfall" to the purchaser-shipper, and the measure of the irreparable loss to the grower-seller.

The complaint was filed in the District Court prior to the effective date of the increased refrigeration

charges. On final hearing, the three-Judge Court dismissed the complaint (and intervening complaints).

The questions involved, and presented by this appeal, concern the order of the three-Judge District Court which denied the relief sought by the plaintiffs (and intervening plaintiffs), the appellants here, and dismissed the complaints.

The opinions of the District Court, upon which the order of dismissal is predicated, makes it clear that the order was based upon an erroneous misconception of the nature and substance of the Commission's Report and Order in Docket 31342. The District Court incorrectly held this "to be a case governed by the doctrines of the general revenue cases" (11a), that "the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided" (9a), that the plaintiffs "have mistaken their remedy" in seeking review by the Court instead of attempting an additional formal complaint, under Sections 13 and 15 of the Interstate Commerce Act, before the Commission, and that the doctrine of the *Arizona Grocery* Case (*Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348) "has no application under the permissive provisions of an order in a general revenue case such as is this case" (16a). Indeed, the majority opinion of the District Court erroneously stated the power and duty of the Commission to adjust rates "so that carriers as a whole, or in each of such rate groups or territories as the Commission will designate, will earn an aggregate net operating income equal to a fair return upon the aggregate value of the railway property of

the carrier used in transportation service" (5a) under 49 USCA sec. 15(a)(2) as it appeared in the Transportation Act of 1920, but subsequently repealed.[13]

It is true that the majority opinion of the District Court states, under the erroneous assumption that this is a "revenue" and not a "rate" case, that "the evidence submitted was of a kind and character sufficient to permit a generalization upon which findings could be based and conclusions drawn" (11a). However, the District Court overlooked the findings in the Report and the facts in the record which conclusively demonstrate that the evidence was not comprehensive in scope, did not support the ultimate conclusions, and clearly that discriminating treatment is visited upon important section 2 traffic (fresh fruits and vegetables), much of which was excluded from the Commission's consideration in arriving at the conclusions stated in the Report.

The District Court conceded that "it is true that Section 4 charges reflect only the cost of ice and salt, and the cost of switching, while Section 2 charges include also ice haulage, bunker damage, supervision and other elements" (13a). The elements "covered by the section 2 charges, but not included in the section 4 charges, amount to about 19 percent thereof" (297 ICC 523). Those elements in the

[13] Sec. 15(a)(2) of the Interstate Commerce Act now reads: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

section 2 charges, which are not in the section 4 charges, are increased by the Commission's order authorizing 15 percent increase — while at the same time authorizing the same percentage increase of section 4 charges but with comparable elements of expense excluded therefrom. The railroads cannot lawfully discriminate; and certainly the Commission has no power to authorize, either by creating or by increasing, a discrimination which is declared unlawful by the statute. The District Court erroneously assumed that an *increase* of discrimination is not prohibited by the statute—for it is said (13a):

> "If there be any discrimination between Section 2 and Section 4 traffic, and this we do not decide, it is a discrimination which existed prior to the proceedings before the Commission whence issued the order under attack. Such discrimination, if any there be, did not result from nor was it substantially altered by the Commission's order."

(e) QUESTIONS INVOLVED ARE SUBSTANTIAL.

Since World War II, incident to that War "and its economic aftermath," there have been numerous so-called "general revenue" cases before the Interstate Commerce Commission involving the whole body of the charges of rail carriers throughout the nation.[14] Some of the emergency or general revenue proceedings have been before this Court, particularly as they

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[14] Ex Parte No. 162, Increased Railway Rates, Fares, and Charges, 1946, 264 ICC 695, 266 ICC 537;
Ex Parte No. 166, Increased Freight Rates, 1947, 269 ICC 33, 270 ICC 81, 270 ICC 93, 270 ICC 403, 279 ICC 303;
Ex Parte No. 168, Increased Freight Rates, 1948, 272 ICC 695, 276 ICC 9;
Ex Parte No. 175, Increased Freight Rates, 1951, 280 ICC 179, 281 ICC 557, 284 ICC 589, 289 ICC 395, 292 ICC 23, 297 ICC 17;
Ex Parte No. 196, Increased Freight Rates, 1956, 298 ICC 279.

affected intrastate rates and charges,—see *United States* v. *Louisiana,* 290 U.S. 70, 54 S. Ct. 28, 78 L. ed. 181, and *King* v. *United States,* 344 U.S. 254, 73 S. Ct. 259, 97 L. ed. 301.

Charges for refrigeration service were not affected by the Commission's decisions in the general revenue cases, except in two instances.[15] The reason for excluding refrigeration charges from the effect of general revenue cases was stated in the Commission's last report in Ex Parte No. 196, Increased Freight Rates, 1956, 298 ICC 279, 346, to be that "the general showing of increased wages materials, supplies, and taxes" is not sufficient to warrant an increase in refrigeration charges.

Docket No. 31342, Proposed Increased Refrigeration Charges, 297 ICC 505, was not an emergency or general revenue case nor did it involve the whole body of rail charges but it concerned only the cost of performing, and just and reasonable rates for a single accessorial service, viz.: refrigeration charges, perishable freight, a relatively small portion of the total rail freight.

The lower Court[16] erroneously misconceived the nature of the Commission's order, the opinion of the District Court (as well as the special concurring opinion of Judge DeVane) holding that this is "a case governed by the doctrines of the general revenue cases" (144 F. Supp. 524) and "this is a revenue case and not a rate case" (144 F. Supp. 527).

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[15] Ex Parte No. 162, Increased Railway Rates, Fares, and Charges, 1946, 266 ICC 537; and Ex Parte No. 166, Increased Freight Rates, 1947, 270 ICC 403.

[16] *Florida Citrus Commission et al* v. *United States,* et al, 144 F. Supp. 517.

The decision of the District Court herein, dismissing the complaint, is founded squarely upon two cases, viz.: *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (involving Ex Parte No. 115, Emergency Freight Charges, 1935, 208 ICC 4), and *Koppers Company* v. *United States,* 132 F. Supp. 159 (involving Ex Parte No. 175, Increased Freight Rates, 1951).

The Commission's Order in Docket 31342, Proposed Increased Refrigeration Charges, which was under attack in the District Court, was the Commission's "final disposition" of the proceeding at the very least "declaratory in form" (Title 5 United States Code, sec. 1001(d)) and it was a "grant of * * * authority" (subsection (f)) to the railroads to publish and make effective the increased refrigeration charges, found and declared by the Commission to be just and reasonable. Even if it were nothing more, it was "a declaratory order to terminate a controversy" (Title 5, U.S. Code, sec. 1004(3)). The order was more than that—it modified outstanding orders which otherwise prevented the increases from being made effective, it made findings as to every element of costs, and it approved and prescribed the maximum rates or charges which can be assessed for refrigeration service.

If the doctrine applied by the lower Court in dismissing the complaint be correct, then it means that judicial review never can be had when the Commission enters a maximum rate order. Under the lower Court's interpretation, either the Commission by a mere change in the form of its order or the carriers by "voluntarily" publishing something less than the prescribed maximum could circumvent the shippers

and preclude any judicial review. Such interpretation would emasculate the statute—Title 28 U.S. Code sec. 1336, that "the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend in whole or in part, any order of the Interstate Commerce Commission."

The lower Court erroneously assumed that "The Commission's order (in Docket 31342) is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided" (144 F. Supp. 523). It is true that the Commission's order does not mandatorily require the establishment of the increased charges; but neither does any maximum rate order of the Commission. The lawfulness of maximum particular rates for refrigeration service was fixed, and the lawfulness of both section 2 and section 4 refrigeration charges was considered, and improper criteria adopted by the Commission in deciding those issues. Not only was there an affirmative finding "that an increase in the specified refrigeration charges in excess of 15 percent is not justified" (297 ICC 554), but also there was the affirmative finding that the "refrigeration charges may be increased" 15 percent, and "that the charges so increased will be just and reasonable for the future."

The philosophy or doctrine that judicial review may be evaded and administrative orders made permanent, even though unlawful, merely by the form of the orders, is inherent in the Court's suggestion that plaintiffs' "remedy is clearly by proceedings under sections 13 and 15 of the Act (49 USCA secs. 13, 15)" (144 F. Supp. 527). Under Section 13 of the Interstate Commerce Act, an investigation complaint or proceeding may be instituted "by petition" which

"state the facts" and complains "of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof," or the Commission may, "at any time," "institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made." Since the Transportation Act of 1920, in any such investigation, inquiry, or complaint proceeding, the Commission has been "authorized and empowered to determine and prescribe" either (1) the just and reasonable rate, (2) the maximum, or (3) the minimum, or (4) the maximum and minimum. The "order" which the Commission is then empowered and authorized to make (in the case of a maximum rate Order) is that the "carriers shall cease and desist from such violation" and "shall not thereafter publish, demand, or collect any rate, fare, or charge * * * in excess of the maximum * * * so prescribed.[17] When the Commission enters its final order, as was done in Docket 31342, determining and prescribing the maximum refrigeration charges which could thereafter be published, demanded, and collected by the carriers, nothing

[17] 49 USCA sec. 15(1): "That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charges, * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, * * *."

further was required as a predicate for judicial proceedings under Title 28 US Code sec. 1336. Whether the Commission denominated its order one in a rate case or one in a general revenue case, or whether the carriers "voluntarily" published the maximum permitted by the Commission's report and order or published a charge within the lawful range of the order, ought not to preclude a judicial review of the order. A subsequent futile attempt by plaintiffs to obtain,, under sec. 13 or sec. 15 as suggested by the lower Court, a different order than the final order actually entered in Docket 31342, is not required by law nor could it be anything except an invitation to prolonged administrative delays and subversion of the substance of orders entered.

One instance of judicial review of an order of the Commission which permitted, but did not require, certain charges found by the Commission to be lawful, is *Secretary of Agriculture* v. *United States,* 347 US 645, 74 S.Ct. 826, 98 L. ed. 1015. In the 1948 report of the Commission, certain unloading charges on fruits and vegetables at New York and Philadelphia were found to be lawful; but on a further hearing, 286 ICC 119, the schedules stating such charges were ordered canceled "and the proceeding discontinued without prejudice to the establishment of charges in conformity with the views expressed herein," viz: lower charges as therein set forth. The lower charges, thus approved by the Commission, were published, and judicial review was sought in the District Court. The District Court's decision was reversed by this Court, and remanded to "the Commission for further proceedings not inconsistent with this opinion." Those unloading charges were "permissive" in the same

sense as the refrigeration charges in Docket 31342, viz: the Commission approved them but did not mandatorily require their publication—they were approved, determined, prescribed, authorized, in identically the same sense, and the carriers voluntarily published the maximum thus approved and authorized by the Commission.

A similar case where there was judicial review of an order of the Commission, the effect of which "was to permit, if not require, the railroads to charge higher reshipment rates for ex-barge than for ex-lake and ex-rail grain" (330 U.S. 572) was *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 67 S. Ct. 894, 91 L. Ed. 1102. On the first appearance of that case in this Court, there was a reversal of the District Court because the Commission's decision then "carried 'no implication of approval of any rates here involved'" and this Court "reserved for future consideration in a proceeding before the Commission the amount, if any, which the eastern railroads could increase 'reshipping' rates for ex-barge over those for ex-lake and ex-rail grain." (330 U.S. 572, quoting from *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 US 671, 688, 691, 63 S. Ct. 1296, 87 L. ed. 1655, 1666, 1668). Upon consideration of that question, the Commission ordered canceled "the scheduled reshipping rate increase 'without prejudice to the filing of new schedules in conformity with the findings herein.' Thus the effect of the whole order was to permit, if not require, the railroads to charge higher reshipment rates for ex-barge than for ex-lake and ex-rail grain." (330 U.S. 572). The three-Judge District Court enjoined that order in part, and it was affirmed by the Supreme Court.

The jurisdiction of the Courts cannot, and ought not to be, defeated by the mere form of an order. A somewhat analogous situation was presented in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U.S. 498, ... S. Ct. ..., 55 L. ed. 310, where the first question was whether there was an "actual controversy," it being claimed that the order of the Commission had expired and therefore that the case should be dismissed. This Court ruled against that contention.[18]

In another case, *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 US 433, 55 L.ed. 283, the lower Court was reversed, with directions to enter decree declaring order of Interstate Commerce Commission to be void. The holding in *Southern Pacific Terminal Co.* v. *I.C.C., supra,* was affirmed, and it was further said:

> "In addition to the consideration expressed in that case, it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined; and the influence and effect

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[18] *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 US 498, 55 L.ed. 310. "The case at bar comes within the rule announced in *United States* v. *Trans-Missouri Freight Asso.*, 166 US 290, 308, 41 L.ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and *Boise City Irrig. & Land Co.* v. *Clark* (C.C. App. 9th Ct.) 65 CCA 339, 131 Fed. 415.

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress."

> which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy."

A very real problem confronting the shipping public by the order of the Commission in Docket 31342, authorizing the publication of the approved increased refrigeration charges, is the effect of that order under the doctrine of the *Arizona Grocery* Case.[19]

The effect of the District Court's ruling, that the plaintiffs should file anew complaints under sections 13 or 15 of the Interstate Commerce Act, is that, at their peril, they must forego appeal to the Courts for review and determination of the lawfulness of the final order entered by the Commission in Docket 31342. Of course, complaints may be filed under section 13, but the filing would be futile in the light of the actual determinations made by the Commission in Docket 31342, and even if a contrary decision were reached on such complaints the parties would be confronted with the principle of the *Arizona Grocery* Case that reparations could not be awarded in the face of the former erroneous conclusion in Docket 31342.

In this particular respect, the report and order in Docket 31342 is entirely different from the general

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[19] *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 US 370, 76 L. ed. 348. "Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier; it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

revenue cases. There is no saving clause in Docket 31342, while in the Ex Parte general revenue cases there is always a specific provision with respect thereto. For example, in Ex Parte No. 196, Increased Freight Rates, 1956, 298 ICC 279, 347: "Rates and charges increased as herein authorized are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370."

The order in Docket 31342 is similar to that in *Columbia Broadcasting System* v. *United States*, 316 US 407, 86 L.ed. 1563, in that the order "is not made subject to future administrative determinations." The order's "applicability to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it." The order presently determines rights on the basis of which the approved increased charges are currently assessed.[20]

The application of the doctrine of the *Algoma and Koppers cases, supra,* to the case at bar, or the extension of such doctrine of lack of judicial review to final orders making administrative determinations materially and substantially affecting the rights of parties, is a dangerous precedent. It would permit the administrative agency or the carriers, at will, to circumvent and avoid judicial review. It would sacrifice substance to mere form. A current instance of the latter

[20] 316 US 425: "The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

is found in *Dixie Carriers* v. *United States*, 143 F. Supp. 844.[21]

The substantial importance of the questions involved to the appellants is clearly indicated and emphasized by the fact, admitted by the Commission's report, that 43 percent of the traffic was subjected to increased charges although the cost of that important traffic was not considered nor determined in the report, that the "section 2" traffic of appellants is subjected to increased cost elements despite the total absence of charges for such elements against similar "section 4" traffic, the fact that the Commission's order authorizes the same increase of 15 percent on refrigeration charges that are 76 percent below cost and charges that already are 9 percent and more higher than cost, the fact that the Commission authorized 15 percent increase in switching charges on "section 4" traffic but used an increase of 146 percent in determining like switching costs on section 2 traffic, the fact that the Commission authorized an increase of 15 percent on charges for salt on section 2 traffic and an increase of 5 percent (99¢ to $1.04 per cwt. on section 4 traffic, the fact that proper costs of rendering refrigeration service on section 2 traffic was not determined, and the fact, e.g., that the uniform percentage increases on all charges alike operates to charge greater amounts for ice in Florida, Texas and California than the costs thereof found by the Commission and less than cost in other areas. As an illustration, the Commission,

[21] *Dixie Carriers* v. *U.S.*, 143 F. Supp. 844, 852: "We do not regard this in a technical light at all. If administrative agencies, no matter how highly motivated their particular action may be, can, under the form of nunc pro tunc corrective orders, presumably 'correct' the subject order to meet the objections specifically urged in a petition for judicial review, effective review would be denied. The vice of the 'and good cause appearing' technique is that it affords nothing the parties or court can take hold of to scrutinize and measure as the basis for the action."

as shown by the Report, used the amount of $6.91 per ton as the restated cost of ice furnished at icing stations in Virginia, although the actual cost for all ice furnished in Virginia was only an average of $5.87 per ton.

The unlawful result of the Commission's order, contrary to the spirit and the letter of the Interstate Commerce Act, makes it vital that the plaintiffs be accorded the right to judicial review in conformity with the statute, and that the said order be declared invalid, and therfore be enjoined, annulled and set aside.

Respectfully submitted,

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APPENDIX

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA,
TALLAHASSE DIVISION

No. 565

FLORIDA CITRUS COMMISSION, et al., *Plaintiffs,*

and

EZRA TAFT BENSON, Secretary of Agriculture, et al.,
Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., *Defendants,*

and

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ARMOUR AND COMPANY, et al., *Intervening Defendants.*

Before JONES, Circuit Judge, and BARKER and DEVANE, District Judges.

JONES, Circuit Judge.

The Interstate Commerce Commission entered its order dated January 9, 1956, on the petition of substantially all of the rail carriers of the country, permitting increases in refrigeration charges to the extent authorized in the Commission's report of the same date. 297 I.C.C. 505. This action is brought to enjoin, annul and set aside the Commission's order under the provisions of the Judicial Code (28 U.S.C.A. §§ 1336, 1337, 1398, 2284, 2321, 2322 and 2325) and by the Administrative Procedure Act. 5 U.S.C.A. § 1009. The action was brought by shippers and representatives of shippers of fresh fruits and vegetables in and from Florida and two agencies of the State of Florida, the Florida Citrus Commission, a body corporate (Florida

Statutes 1955, § 595.01 et seq.) and Florida Railroad and Public Utilities Commission, an unincorporated regulatory agency exercising quasi-judicial powers. Florida Statutes 1955, § 350.01 et seq. By intervention, Western Growers Association, a trade association of growers and shippers of melons and vegetables in and from Arizona and California, California Citrus League, a trade association of growers and shippers of citrus fruits in and from Arizona and California, and Ezra Taft Benson, Secretary of Agriculture, became parties plaintiff.

The charges made by rail carriers for refrigeration services are separate from the so-called line-haul rates. 49 U.S.C.A. § 6(1). The charges for refrigeration services are prescribed by the Interstate Commerce Commission or established by the rail lines. They are set forth in the published tariffs of W. T. Jamison, agent for the railroads. The refrigeration charges, for the most part, are of two basic groups, one known as Section 2 charges and the other being Section 4 charges. The designations come from the numbering of the sections of Agent Jamison's tariffs where the charges are scheduled. Generally speaking, Section 2 charges apply in the transportation by rail of fresh fruits, vegetables, melons, berries and processed foods. The commodities to which Section 4 charges are applicable include fresh meats and packing house products, fish, dairy products, bananas, coconuts and beer. Section 2 charges are based, or intended to be based, upon cost of ice in bunkers, supervision, switching to and from icing stations, damage to bunkers and cars, ice haulage in bunkers, accounting, hazard, taxes, and a return on investment. Section 4 charges are intended to include only cost of ice, salt and switching. Shippers using Section 4 services have urged that the carriers are compensated for the Section 2 costs not included in Section 4 charges in the line-haul rates on Section 4 commodities. A number of types of refrigeration services are available in order to provide for the different needs of shippers of various commodities from and to diverse points of origin and destination.

During the period of 1946 to 1951, inclusive, the Interstate Commerce Commission authorized increases in refrigeration charges aggregating 32.25 per cent. Ex Parte No. 162, Increased Railway Rates, Fares and Charges, 1946, 266 I.C.C. 537; Ex Parte No. 166, Increased Freight Rates, 1947, 270 I.C.C. 403. During the same period the Commission, in "general revenue" proceedings, authorized increases of interstate freight rates to the extent of 78.9 per cent. Ex Parte No. 162, Increased Railway Rates, Fares and Charges, 1946 *supra;* Ex Parte No. 166, Increased Freight Rates, 1947, *supra;* Ex Parte No. 168, Increased Freight Rates, 1948, 276 I.C.C. 9; Ex Parte No. 175, Increased Freight Rates, 1951, 281 I.C.C. 557. A recent order allows a further freight rate increase of 6 per cent. Ex Parte No. 196, Increased Freight Rates, 1956, — I.C.C. —. In Ex Parte No. 168, and again in Ex Parte No. 175, the Commission found the evidence inadequate to show that existing charges did not compensate the carriers for their costs in furnishing refrigerating services. In 1951 the rail carriers decided to conduct a survey to ascertain the costs of refrigeration services as a basis for determining whether an increase in charges could be justified. The method of making the survey and the results obtained from it need not be here recited beyond the extent required for our determination of the questions before us. They are fully detailed in the report of the Commission. The rail lines, basing their conclusion on a report of the survey, estimated that Section 2 refrigeration costs exceeded revenues by 29.8 per cent.

The rail carriers, by their petition filed with the Interstate Commerce Commission, sought increases of 30 per cent., with some exceptions, of the Section 2 charges, and specific increases for the charges for ice, salt and switching in the Section 4 charges. In their petition the carriers asserted that their cost studies showed that on the basis of 1951 figures, the cost of refrigeration services was more than $12,000,000 in excess of the revenues from such serv-

ices. All of the interests before the Court were represented in the proceedings before the Commission. The Commission held numerous hearings at various places, built up a large record of testimony and exhibits, a report was proposed by the Examiner, exceptions to the proposed report were filed, briefs were submitted, and oral argument was heard by the full Commission on three different days.

In its report the Commission found that the carriers were sustaining a deficit of 23 per cent. of their refrigeration charge revenue from Section 2 traffic, and an ice cost of approximately 17 per cent. in excess of revenue on Section 4 shipments. But, finding that a substantial portion of the affected traffic could not bear increases to the extent required to fully cover costs of service, the Commission authorized increases of 15 per cent in the basic refrigeration charges. Petitions for Reconsideration were filed with the Commission, and while these petitions were pending this suit was instituted. The Commission denied the Petitions for Reconsideration on April 16, 1956, and, this Court meanwhile having declined a stay, the increases became effective April 17, 1956.

At the outset we are met with the contention that no order was issued under Section 15(1) of the Interstate Commerce Act, (49 U.S.C.A. § 15(1)), and that no notice was given under Section 4(a) of the Administrative Procedure Act, (5 U.S.C.A. § 1003(a)), which relates to rule making by administrative agencies. More nearly pertinent, we think, is Section 5(a) of the Administrative Procedure Act, (5 U.S.C.A. § 1004(a)), providing for notice of agency hearings. Wherever it appears that the absence of notice has resulted in prejudice to a complaining party the action of the administrative agency will be set aside. Pinkett v. United States, D. C. Md. 1952, 105 F. Supp. 67. But no prejudice is shown where, as in this case, the party complaining had actual knowledge of and participated in the administrative proceedings and he will not be heard to complain of the failure to give formal notice. W. J. Dillner

Transfer Co. v. United States, D.C.W.D. Pa. 1951, 101 F. Supp. 506; C. E. Hall & Sons, Inc. v. United States, D.C. Mass. 1950, 88 F. Supp. 596. We think it doubtful that the hearings of the Commission in the proceeding we here consider were of the kind contemplated by the section of the Interstate Commerce Act requiring notice, but the absence of any showing of prejudice relieves us of the necessity to decide the point.

By the enactment of the Emergency Transportation Act, 1933, 48 Stat. 211; 49 U.S.C.A. § 15(a)(2), the Congress gave to the Interstate Commerce Commission the power and imposed the duty to adjust rates so that carriers as a whole, or in each of such rate groups or territories as the Commission might designate, will earn an aggregate net operating income equal to a fair return upon the aggregate value of the railway property of the carriers used in transportation service. Under the provisions of Section 13 of the Commerce Act, 49 U.S.C.A. § 13(1), "any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization", within which inclusive descriptions each plaintiff may find a designation, may petition the Commission and complain of anything done or omitted by any common carrier subject to the Act in contravention of the provisions of the Act. By Section 15, 49 U.S.C.A. § 15(1), the Commission is empowered, upon a complaint or on its own initiative, to determine whether any individual or joint rate, fare or charge is or will be unjust, unreasonable or unjustly discriminatory, and may determine and prescribe just and reasonable rates, fares and charges. Under Section 15(a) and the implementing provisions of the Act, the Commission has exercised jurisdiction in a number of proceedings which have been commonly called "general revenue" cases, where revision has been sought as to all or substantially all of the rates or charges on all traffic or on particular commodities or groups of commodities, either nation wide or in a large

territory, in contradistinction to the "rate" cases, so called, in which the reasonableness of specific rates has been determined. Among the first, and perhaps the earliest of the court decisions dealing with a general revenue case, is the leading Algoma case. Algoma Coal & Coke Co. v. United States, D.C.E.D. Va. 1935, 11 F. 2d 487.

In the Algoma case, producers and shippers of coal sought the annulment of rate increases on that commodity, which increases had been made effective pursuant to an order of the Commission authorizing rate increases on a selective basis. Emergency Freight Charges, 1935, Ex Parte No. 115, in the Matter of Increases in Freight Rates and Charges, 1935, 208 I.C.C. 4. In a frequently cited and well reasoned opinion by District Judge Chestnut, it was held that the plaintiffs could not prevail. The suit was dismissed. The Court said:

> "The plaintiffs have mistaken their remedy in the statutory scheme of railroad rate making. Their contention is that the Commission, without sufficient evidence or proper findings of fact, has determined or fixed particular rates for the plaintiffs' particular traffic. But this misconceives what the Commission has actually done. It was not dealing finally with particular rates for particular traffic, but permitting increased rates for selected commodities, by a general order affecting all the railroads in the country. If the increased rates as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under Sections 13 and 15 of the act (49 USCA §§ 13, 15) for individual relief, and for reparation orders under section 16(1) of the act, 49 USCA § 16(1). Brimstone R. & Canal Co. v. United States, 276 U.S. 104, 122, 48 S. Ct. 282, 72 L. Ed. 487; Alexander Sprunt & Son v. United States, 281 U.S. 249, 256, 50 S. Ct. 315, 74 L.Ed. 832; Eagle Cotton Oil Co. v. Southern Ry. Co. (C.C.A. 5) 51 F. (2d) 443, certiorari denied 284 U.S. 675, 52 S. Ct. 130, 76 L. Ed. 571. Nothing in the Commission case debars them from such relief. Counsel for the railroad companies before the Commission and in this

court proceeding concede that the rule of Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348, would not be available to defeat the plaintiffs' remedy in this respect before the Commission, upon a proper showing.

"It is necessarily inconsistent with the whole scheme of the Interstate Commerce Act, which requires uniformity and nondiscrimination as to rates, to permit particular shippers to obtain individual relief in courts of different jurisdictions, with possible lack of uniformity in results, in matters committed to the administrative functions of the Commission, including the reasonableness of rates, until after the Commission has acted on the particular subject. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U.S. 481, 30 S. Ct. 164, 54 L. Ed. 292; Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U.S. 285, 291, 42 S. Ct. 447, 66 L. Ed. 943. Consistently therewith, it has been held by the Supreme Court in a number of cases, that individual shippers may not maintain suits to annul orders of the Commission unless they can show an invasion thereby of some independent legal right, whereby they particularly are subjected to injury. Alexander Sprunt & Son v. United States, 281 U.S. 249, 256, 50 S. Ct. 315, 74 L. Ed. 832; United States v. Merchants' & Manufacturers' Traffic Ass'n of Sacramento, 242 U.S. 178, 37 S. Ct. 24, 61 L. Ed. 233; Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 44 S. Ct. 72, 68 L. Ed. 216." Algoma Coal & Coke Co., et al. v. United States, 11 F. Supp. 487.

The plaintiffs and intervening plaintiffs, other than the Secretary of Agriculture, assert that there is considerable doubt as to the correctness of the rulings in Algoma. They do not support their doubt with either a statement of a contravening principle or the citation of any authority superseding it as a precedent. The Secretary of Agriculture, with commendable candor, says that the Algoma case is "still the law of the land on the subject". On a number

of grounds it is urged that the case before us is not a general revenue case, but a rate case, and as such the charges authorized by it are unjust, unreasonable and discriminatory. It is further contended that even if it be decided that this is a general revenue case, there is no competent evidence of any need of additional revenue by the carriers. Unless the order is based upon a misconstruction of the Act or is unsupported by substantial evidence, it is entitled to a presumption of validity. 5 U.S.C.A. § 1099; Baltimore & Ohio Railroad Co. v. United States, 298 U.S. 349, 56 S. Ct. 797, 80 L. Ed. 1209; Amarillo-Borger Express, Inc. v. United States, D.C.N.D. Tex., 1956, 138 F. Supp. 411. It has been said by the Supreme Court, "Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited." Interstate Commerce Commission v. Mechling, 330 U.S. 567, 67 S. Ct. 894, 91 L. Ed. 1102. See also Atchison, Topeka and Santa Fe Railway Co. v. United States, 232 U.S. 199, 34 S. Ct. 291, 58 L. Ed. 568; United States v. Chicago Heights Trucking Co., 310 U.S. 344, 60 S. Ct. 931, 84 L. Ed. 1243; Ontario Freight Lines Corporation v. United States, D.C.N.J. 1948, 76 F. Supp. 526. With these general guides we approach the questions so ably presented by contending counsel.

In the opinion in the Algoma case, *supra,* the Court observed that the order of the Commission there under review was permissive in character, that it prescribed no particular rates, that the lawfulness of individual proposals was not passed upon, and that it was open to the plaintiffs, under Sections 13 and 15 of the Act, 49 U.S.C.A. §§ 13, 15, to present to the Commission their contentions that particular rates initiated pursuant to its order were unreasonable and discriminatory. In Algoma it was also pointed out that the resulting rates fixed pursuant to the Commission's order would be subject to complaint and a

determination of reasonableness, and that the Commission's order would not debar the right to reparations in a proper case. The plaintiffs contend that the Car Unloading Case, Secretary of Agriculture v. United States, 347 U.S. 645, 74 S. Ct. 826, 98 L. Ed. 1015, is a controlling precedent for the position they take. There the Commission had entered an order approving maximum charges for the unloading by railroads of carload shipments of fruit and vegetables at the rail terminals in New York and Philadelphia. The Supreme Court, reversing the District Court of the Southern District of Florida, held that as a general rule line-haul rates included the making of the goods accessible to the consignee and that the commission had failed to show a legal basis for departing from this general rule although a majority of the Court was of the opinion that the Commission had the power in a proper case to fix unloading charges separate from the line-haul rates. We do not have here any such factual situation as was presented in the Car Unloading Case. It is not disputed that refrigeration charges may be made separately from line-haul rates. In the case before us it is suggested that the line-haul rates on Section 4 traffic include some of the elements that are in the refrigeration charges applicable to Section 2 shipments, but it would not follow from this that we are dealing with a rate case rather than a general revenue case.

As in the Algoma case, the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided. In its order the Commission said that:

> "* * * to enable the petitioning carriers, under honest, economical, and efficient management, to provide adequate refrigeration service and specifically to meet increased costs of rendering that service, the basic refrigeration charges may be increased as herein specified, and that the charges so increased will be just and reasonable for the future." 297 I.C.C. 554.

It omitted from its order any provision for modification in specific situations as was done in the order considered in King v. United States, 344 U.S. 254, 73 S. Ct. 259, 97 L. Ed. 301. We are urged to say that this inclusion and this omission make the case one fixing rates rather than authorizing a general revenue increase. The Commission's power, whether to fix specific rates or charges or to authorize a general increase of rates or charges, does not, of course, extend to the fixing or authorizing of an unjust or unreasonable rate or charge, and putting the quoted words in their context in a general order, they mean no more than that the overall general increases as authorized will be just and reasonable. Such a finding does not preclude the making of applications to the Commission on any claim that a particular charge is unjust or unreasonable. Nor does the omission of a saving clause, such as was in the order considered in King v. United States, *supra*, preclude the making of such applications or alter the duty of the Commission to consider and decide such applications. The right to apply and the duty to decide have been given by the Congress in Sections 13 and 15 of the Act. The Commission has not, and indeed could not, foreclose the right or renounce the duty in an order authorizing general increases in transportation rates or charges. The Commission has said that its "sanction of a general adjustment does not carry with it the approval of any particular rate." Steel & Tube Co. v. Director General, 61 I.C.C. 526. This decision has had the approval of the Supreme Court in Brimstone Railroad & Canal Co. v. United States, 276 U.S. 104, 48 S. Ct. 282, 72 L. Ed. 487, and of the Court of Appeals for the Fifth Circuit in Eagle Cotton Co. v. Southern Railway Co., 51 F. 2d 443. In its order the Commission suggested that:

> "After the establishment of the increases herein authorized, the petitioners (rail carriers) should conduct thorough and comprehensive studies that will permit sound determinations as to the effect of in-

> creases upon the movement of traffic, and as to any inequities or improper relations that may have developed from changed conditions since their original establishment." 297 I.C.C. 554.

This language indicates a recognition by the Commission of its continuing duty to determine and prescribe just and reasonable individual rates and charges notwithstanding the entry by it of a general order authorizing increases.

We see nothing to prevent this case from being governed by the same rules as are applied in general revenue cases by the styling of the proceeding before the Commission as "Proposed Increased Refrigeration Charges", rather than the "Ex Parte" designation usually given to such proceedings. No different principles are to be applied in this, a general revenue case where revenues are intended to be no more than compensatory, than in the general revenue cases involving line-haul rates where revenues are expected to include profits.

We come now to the contention of the plaintiffs that if we should hold this to be a case governed by the doctrines of the general revenue cases, and we do so hold, nevertheless the evidence does not show nor the findings support the Commission's conclusions or warrant the entry of its order. The evidence, for the most part, was obtained by means of the traffic study made on behalf of the carriers. In the making of the study, data were accumulated from a large number of icing stations under procedures designed to obtain a sample of approximately 10 per cent. of shipments under standard refrigeration moving under Section 2 tariffs. The methods used in the study are recited at length and in detail in the Report of the Commission. They need not be set forth here. It is enough that we say that the evidence submitted was of a kind and quantity sufficient to permit a generalization upon which findings could be based and conclusions drawn. The Supreme Court of

the United States has approved basing findings on such evidence, saying:

> "When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. * * * To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief." Georgia Public Service Commission v. United States, 283 U.S. 765, 51 S. Ct. 619, 75 L. Ed. 1397.

We are unpersuaded that the factors used in the study were not such as reflected existing conditions and, this being so, it is not a part of our function to review the determination based thereon. As said by the Supreme Court:

> "It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decisions or the consistency of its conclusions with those reached in similar cases." Georgia Public Service Commission v. United States, *supra.*

The Commission found a vast multitude of specific facts, it made an ultimate finding that the rail carriers were "sustaining a total deficit exceeding 23 per cent. of the aggregate revenue accruing from the rendition of their refrigeration services". Because of the increasing diversion of this type of traffic from railroads to trucks, because of instances where increased charges would keep goods from shipment to markets, and other considerations, the Commission found "that an increase in the specified refrigeration charges in excess of 15 per cent. is not justified by the indicated circumstances". The Commission concluded that to enable the carriers, "under honest, economical, and efficient management, to provide adequate refrigeration service and specifically to meet increased costs of rendering that service, the basic refrigeration charges may be increased as herein specified, and that the charges so

increased will be just and reasonable for the future". The findings are supported by substantial evidence and afford an adequate basis for the Commission's conclusions.

It is strongly insisted by the plaintiffs that the differences in the treatment accorded by the Commission's order with respect to Section 2 charges on the one hand and Section 4 charges on the other result in unlawful discrimination against and unjust treatment of the users of Section 2 services. It is true that Section 4 charges reflect only the cost of ice and salt, and the cost of switching, while Section 2 charges include also ice haulage, bunker damage, supervision and other elements. If there be any discrimination between Section 2 and Section 4 traffic, and this we do not decide, it is a discrimination which existed prior to the proceedings before the Commission whence issued the order under attack. Such discrimination, if any there be, did not result from nor was it substantially altered by the Commission's order. Whether there be an unjust discrimination is a question for the Commission. The Commission has found that the Section 2 charges and the Section 4 charges do not apply to like traffic and that no showing is made of any disadvantage or injury to Section 2 traffic or the shippers thereof. "In these circumstances", the Commission found, "any existing deficiency in the Section 4 charges does not relieve Section 2 traffic of the responsibility of bearing the full cost of that service and is not a consideration in the determination of the lawfulness of the increase proposed in the Section 2 charges". The finding is supported by the evidence. Differences in rates and charges as affecting different classes of non-competing shippers or consignees are not per se unjustly discriminatory. We find ourselves in accord with the Commission's position. See Board of Trade v. United States, 314 U.S. 534, 62 S. Ct. 366, 86 L. Ed. 432, reh. den. 315 U.S. 826, 62 S. Ct. 621, 86 L. Ed. 1222.

On the theory that we have under review a rate case rather than a revenue case, the plaintiffs assert they will

have no opportunity for redress from the discriminatory effects of the increases in the charges as applied to specific situations unless we set aside the Commission's order. But, it appears, the plaintiffs in this case as in Algoma Coal & Coke Co. v. United States, *supra*, and in Koppers Company v. United States, D.C.W.D. Pa. 1955, 132 F. Supp. 159, have mistaken their remedy. The situation in the latter case is so nearly parallel to that before us and the opinion of the Court so expressive of our views, we quote at some length from it. There it is said:

> "Plaintiff's suit before this court seeks to have the court direct the Commission to grant the relief sought in plaintiff's petition for reconsideration initially filed before the Commission, which is to require the southern carriers to maintain the same rate on transportation of coal from the southern mines to Hampton Roads ports for subsequent transshipment by water, whether the ultimate destination is the plaintiff's plant at Seaboard, New Jersey, or its competitors located at New England ports.
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> "The crucial issue, therefore, is whether this court may set aside and annul a permissive order entered by the Commission when plaintiff has failed to exhaust his remedy under Sections 13 and 15 of the Interstate Commerce Act, but has interceded as an intervenor for reconsideration and modification of the Commission's findings.
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> "In the case of a permissive order, the carrier is the only necessary party to the proceeding. The Commission represents the public. While it is proper and customary for shippers interested to participate in hearings, there exists no provision for notice to them. They are not bound by the order entered and the tariffs filed. If the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, Sections 13 and 15 afford ample remedy. To permit shippers to seek redress for such grievances in the courts would invade and

often nullify the administrative authority vested in the Commission. The attempt of the court to remove some alleged unjust discrimination might result in creating more. United States v. Merchants' & Manufacturers' Traffic Association, 1916, 242 U.S. 178, 37 S. Ct. 24, 61 L. Ed. 233.

"Sections 13 and 15 of the Act speak with clarity, and explicitly specify the procedure which complainants must pursue before the Commission in order to seek redress of grievances.

"The plaintiff has mistaken its remedy in the statutory scheme of railroad rate making. Its contention is that the Commission, without sufficient evidence or proper findings of fact, has determined or fixed particular rates for the plaintiff's particular traffic. But this misconceives what the Commission has actually done. It was not dealing finally with particular rates for particular traffic, but permitting increased rates for selected commodities, by a general order affecting all the railroads in the country.

"If the increased rates as applied to the plaintiff's particular situation can be shown to be unjust and unreasonable, its remedy is clearly by proceedings under Sections 13 and 15 of the Act for individual relief, and for reparation orders under the Act of Congress. 49 U.S.C.A. § 16(1); Brimstone R. & Canal Co. v. United States, 1928, 276 U.S. 104, 48 S. Ct. 282, 72 L. Ed. 487; Alexander Sprunt & Son v. United States, 1930, 281 U.S. 249, 50 S. Ct. 315, 74 L. Ed. 832; Eagle Cotton Oil Co. v. Southern R. Co., 5 Cir. 51 F. 2d 443, certiorari denied, 1931, 284 U.S. 675, 52 S. Ct. 130, 76 L. Ed. 571; Algoma Coal & Coke Co. v. United States, D.C. E.D. Va. 1935, 11 F. Supp. 487. The plaintiff must proceed to exhaust its administrative remedies by challenging the rates filed by the railroads pursuant to the authorization granted it by the Commission in the ex parte proceeding.

* * * * *

"It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been

> meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits." Koppers Company v. United States, *supra.*

It has been settled that the Interstate Commerce Commission is without power to award reparations with respect to shipments which moved under rates approved or prescribed by it. Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co., 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348. Cf. Atlantic Coast Line Railroad Co. v. State of Florida, 295 U.S. 301, 55 S. Ct. 713, 79 L. Ed. 1451. But this rule has no application under the permissive provisions of an order in a general revenue case such as is this case. Supported by substantial authority it was held in the Algoma case, "If the increased rates as applied to the plaintiffs' particular situation can be shown to be unjust and unreasonable, their remedy is clearly by proceedings under Sections 13 and 15 of the Act (49 U.S.C.A. §§ 13, 15) for individual relief and for reparation orders under Section 16(1) of the Act, 49 U.S.C.A. § 16(1). (Citing cases) Nothing in the Commission case debars them from such relief." This, we think, as expressed by the Secretary of Agriculture, is the law of the land, and it is applicable to the instant case.

Other questions are posed by plaintiffs. These have been considered and found to be without merit or inapplicable here. Adding to the length of this opinion by a discussion of them would not serve a useful purpose. For the reasons herein given the relief sought must be denied and the com-

plaints must be dismissed. An appropriate order will be entered.

/s/ WARREN L. JONES
Warren L. Jones
United States Circuit Judge

/s/ WILLIAM J. BARKER
William J. Barker
United States District Judge

DEVANE, District Judge, concurring specially:

The legal line separating North Carolina v. United States, 325 U.S. 507, and similar cases on the one hand, and King et al v. United States, 344 U.S. 254, and other like cases on the other hand is so thin it is sometimes difficult to follow. This is such a case.

I agree with my associates that this is a revenue case and not a rate case, and that the Commission had sufficient information before it to support an appropriate general order applicable in such cases—in fact, the evidence is insufficient to support any other kind of order.

I also agree with much said by Commissioner Clarke in his dissenting opinion, particularly with his statement that flat percentage increases in this case "results in increasing charges which are already equal to or above total costs, and overcharging certain commodities, or certain movements, or certain types of service may be moved at a loss." The answer to this criticism, however, is ably made in Judge Jones' opinion, in which he points out that the variations in the rates prescribed for Section 2 commodities as compared with Section 4 commodities has been in effect for many years and is not the result of this case. All this case does is to increase the discrimination a little more.

The troublesome question to me in the case is the failure of the Commission's order to provide, as it has provided in other similar cases (see King et al v. United States et al,

supra), that if the parties affected are entitled to relief insofar as any specific rates are concerned, they may take their cases to the Interstate Commerce Commission and there secure the relief to which they are entitled. That provision is to be found in most if not all prior general revenue orders heretofore entered by the Commission. It does not appear in this case. However, I agree with Judge Jones that the failure to incorporate it in the opinion or order in this case has no legal effect on the rights of the parties to be heard. If the Commission holds otherwise, then the case will have processed under administrative procedure to a point where the court will be in a position to deal with the issue. It is clear to me that this case has not been processed administratively to a point where the court may rule upon the lawfulness of the rates prescribed in this general order. Comp. Myers v. Bethlehem Corp., 303 U.S. 41 Text 50-51.

/s/ Dozier A. DeVane
Dozier A. DeVane
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. 565

FLORIDA CITRUS COMMISSION, et al., *Plaintiffs,*

and

EZRA TAFT BENSON, Secretary of Agriculture, et al.,
Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., *Defendants,*

and

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ARMOUR AND COMPANY, et al., *Intervening Defendants.*

Order

This cause having been considered by the Court consisting of the undersigned Judges convened pursuant to law, upon the pleadings and evidence and the briefs and argument of counsel, and the Court being advised, it is

ORDERED that the relief sought by the plaintiffs and the intervening plaintiffs herein should be and is hereby denied and the complaints herein filed and this cause are hereby dismissed.

DONE AND ORDERED this 7th day of September, 1956.

/s/ WARREN L. JONES
United States Circuit Judge

/s/ WILLIAM J. BARKER
United States District Judge
/s/ DOZIER A. DEVANE
United States District Judge

INTERSTATE COMMERCE COMMISSION

No. 31342

PROPOSED INCREASED REFRIGERATION CHARGES

Decided January 9, 1956

Upon petition of rail carriers for authority to increase their refrigeration charges throughout the United States, just and reasonable increases authorized.

Robert H. Bierma, H. D. Boynton, John J. Burchell, J. Carter Fort, Jr., M. L. Cassell, Jr., J. T. Clark, S. S. Clark, John H. Colgren, A. P. Donadio, R. B. Elster, F. W. Gwathmey, Alfred S. Knowlton, Roland J. Lehman, E. R. Leigh, John C. Lyon, W. H. Ploeger, J. C. Smith, and *E. J. Zoll, Jr.*, for petitioners.

Wilbur C. King, Jerry W. Carter, Richard A. Mack, R. Y. Patterson, Jr., Lewis Petteway, and *Fred Pettijohn* for Florida Railroad Commission.

Paul E. Blanchard, Charles E. Bowling, Robert L. Farrington, Walter D. Matson, J. L. Pease, Harry Ross, Jr., and *Leon Schilt* for United States Department of Agriculture.

B. M. Angell, Harold H. Angier, Austin F. Anson, William J. Augello, Jr., W. J. Augello, Nuel D. Belnap, Frank C. Brooks, A. Robert Cunningham, Willis R. Deines, Lloyd C. Dell, John F. Donelan, James T. Duncan, William C. Ehalt, Ernest Falk, Samuel Fraser, Ray V. Harron, Walter Hoffman, J. Perry Jones, R. E. Kidwell, P. C. King, Jr., W. A. Knight, Robert L. Knott, Dickson R. Loos, Karl D. Loos, Christian Loresch, Jr., E. Alan Mills, John A. Montgomery, C. B. Moore, Clark Munn, Jr., Robert C. Neill, H. J. Owens, T. R. Phillips, Durward Seals, George P. Shuler, A. Silverman, Gordon Stedman, R. L. Stevenson, Fred H. Tolan, R. I. Toolin, Scott Toothaker, Warren H. Wagner, M. W. Wells, Eli Weston, and *Warren Whitham* for other parties.

Report of the Commission

By the Commission:

Exceptions to the report proposed by the examiner were filed by the petitioners and the protestants generally, and we have heard the parties in oral argument. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By a petition filed on August 31, 1953, as amended at the hearing, practically all of the railroads of the country, herein collectively termed petitioners, ask the Commission to authorize increases in their

refrigeration charges and modify all outstanding orders so that increases may be made effective. Hearings were held on the petition. It is opposed by a great majority of the Nation's shippers[1] of commodities that would be affected by such increases, hereinafter sometimes called protestants.

Appendix A hereto shows, in detail, the increases proposed by the petitioners. Generally, the proposal is to increase by 30 percent, with the exceptions indicated in appendix A, the charges published in section 2 of Agent Jamison's perishable protective tariff I. C. C. No. 31, hereinafter called section 2 charges, and those provided in other sections thereof that are based thereon, and to increase by specified amounts the charges published in section 4 of the same tariff, hereinafter called section 4 charges. As indicated in appendix A, no increase is sought in the charges provided in the several rules therein enumerated.

The section 2 charges apply generally for refrigeration services in connection with the movement of fresh fruits and vegetables, berries, melons, and processed foods moving under refrigeration, while those provided in section 4 embrace all other commodities. Typical of the commodities ordinarily transported subject to the section 4 charges are bananas, coconuts, beer, dairy products, fish, fresh meats, and packinghouse products.

The present charges, exclusive of general increases authorized, include those prescribed by the Commission in *Refrigeration Charges on Fruits, etc., from the South*, 151 I. C. C. 649 (February 12, 1929) and 172 I. C. C. 3 (February 3, 1931), hereinafter referred to as the first prior proceeding; *Charges for Protective Service to Perishable Freight*, 215 I. C. C. 684 (June 2, 1936), 241 I. C. C. 503 (October 1, 1940), and 253 I. C. C. 351 (September 8, 1942), hereinafter referred to as the second prior proceeding; *Half Stage Refrigeration Service*, 256 I. C. C. 213 (August 31, 1943); and those voluntarily established by the carriers. The prescribed charges were predicated on the determination that they should be sufficient to cover the cost thereof plus

[1] Shippers and groups of shippers actively opposing the proposed increase include the following: Growers and Shippers League of Florida; Florida Citrus Commission; Florida Canners Association; Florida Citrus Mutual; Florida Fruit and Vegetable Association; F. H. Vahlsing, Inc., of Texas; Texas Citrus and Vegetable Growers & Shippers; California Citrus League; Western Growers Association; Northwest Horticultural Council; Washington Potatoe and Onion Shippers Association; Idaho Shippers Association, Inc.; Idaho State Grange; Idaho Horticultural Society; Idaho Potato Producers Association; International Apple Association; United Fresh Fruit and Vegetable Association; National Association of Fruit Packers; Fairmont Foods Company; General Foods Corp.; The Great Atlantic & Pacific Tea Company; Stokely Van Camp, Inc.; National Fisheries Institute, Inc.; Northwest Fish Traffic Committee; Booth Fisheries Company; Armour & Company; The Cudahy Company; Emmert Packing Company; George A. Hormel & Company; Henry Fisher Packing Company; John Morrell & Company; Kingan & Company; Louisville Provision Company; Oscar Mayer & Company; Rath Packing Company; Swift & Company; and Wilson & Company.

a fair return on the investment in facilities required for the performance of the services. Being accessorial to the basic line-haul service, these charges were prescribed as exact charges, necessary to cover the additional cost incurred by the carriers in performing the services. Also set forth were unit costs of the several elements [2] that had been recognized as contributing to the cost of rendering refrigeration service, in connection with which it was concluded that the application of such of those unit costs as might be pertinent to the particular class of service used would indicate the proper charge. The prescribed section 2 charges are predicated on those elements, which will be discussed hereinafter in more detail. The present section 4 charges include only the elements of ice, salt, and switching. As indicated by the exceptions enumerated in appendix A hereto, no increase is sought in the charges for hazard and repairs of damage to the bunkers and bodies of cars.

There are numerous types of refrigeration services available to the shippers of perishable commodities, the maximal being standard refrigeration with re-icing to capacity of the bunkers at all regular re-icing stations en route. Illustrative of the lesser, or so-called modified, services are those provided in tariff rules Nos. 239, 240, 242, 243, 245, 247, 248, 249, 251, 252, 254, 255, and 258. The inherent nature of the commodity, the market to which it is consigned, and the time of movement are the principal factors which influence the choice of the particular type of service used.

Appendix B hereto lists some of the principal types of the various refrigeration services provided in the perishable protective tariff. In addition to the charges for icing or re-icing to capacity of bunkers as provided in each of the various rules covering bunker icing services, the tariff also provides charges for corresponding half-stage refrigeration service (icing to half capacity of the bunkers), which are about 22 percent lower. Shipments that are accorded top or body icing service usually require, in addition thereto, the placing of ice in the bunkers in accordance with one of the various bunker refrigeration services described in appendix B. Green corn, for example, would require standard refrigeration service, while one of the lesser bunker refrigeration services would be used for some other commodities. When both top icing and bunker refrigeration services are rendered, the shipment is subject to the charges provided for each service.

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[2] The elements of expense that enter into the cost of furnishing refrigeration services fall into the following groups: Cost of ice in bunkers; supervision; switching to and from icing stations; bunker repairs, repairs of damage to cars caused by top or body icing; haulage of ice in bunkers; station and auditor's accounting cost; hazard; taxes; return on investment in facilities devoted to the performance of refrigeration services; and cost of precooling.

The charges for the various refrigeration services differ widely dependent upon the character of the service rendered. For the several types of modified services they range from about 15 to 85 percent of the charge for standard refrigeration between the same points, the lowest being for rule 242 service when 10,000 pounds of ice is used, and the highest applying in connection with shipments accorded rule 245 service with, for example, precooling, preicing and replenishing by the carrier, and re-icing three times in transit. For the maximal service, or standard refrigeration service, there are about six different sets of charges dependent partly upon the commodity involved, among the highest being for shipments of melons with icing to capacity of bunkers and preicing by the carrier.

Among the highest charges maintained by the carriers for refrigeration services are those from California group A origins, which include Los Angeles, to Boston, Mass. The maximum increase per car proposed for standard refrigeration from and to those points would amount to about $41 when no salt is used and approximately $62 when the authorized maximum ratio of salt is used, which is 30 percent of the weight of ice in the bunkers of the car. For the various lesser or modified services, the increases proposed from and to the same points would range from $4.37 to approximately $33. When salt is supplied by the carrier in icing or re-icing perishable shipments, it is subject to varying charges in addition to the stated refrigeration charge. The maximum addition is 50 percent of the stated charge for standard refrigeration, and lesser additions apply when less than the stated maximum of salt is used. The table below shows the present and proposed charges, per car, for standard refrigeration without salt from representative origins to representative markets; in addition to these charges as they may be affected by the amount of salt used, there is also, on shipments of citrus fruit from California, a charge of $6.61 when preicing is performed by the carrier:

From—	Standard refrigeration charges to—					
	Chicago, Ill.		New York, N. Y.		Boston, Mass.	
	Present	Proposed	Present	Proposed	Present	Proposed
Lake Wales, Fla	$90.60	$117.78	$83.48	$82.52	$68.77	$89.40
Harlingen, Tex	96.54	125.50	111.09	144.42	117.70	153.01
Los Angeles, Calif	101.83	132.38	125.64	163.33	132.25	171.93

The so-called perishable traffic embraces a large number of commodities, such as the numerous fresh vegetables; the various kinds of fresh fruits, including bananas and coconuts; berries; melons; fresh meats and packinghouse products; dairy products; eggs; fresh fish, includ-

ing clams, crabs, lobsters, oysters, and shrimp; ale, beer, and beverages. The annual volume, about 1,100,000 carloads, constitutes one of the most important segments of railroad traffic. Some of it is accorded ventilation or heater service during certain seasons of the year, but the great bulk of it moves under refrigeration. Illustrative of the traffic that would be affected by the increase proposed is the movement during the 1952–53 season of approximately 100,000 carloads of fresh fruits and vegetables from Florida, 40,000 carloads of fresh fruits and vegetables from Texas, 265,000 carloads of fresh fruits and vegetables from California and Arizona, 35,000 carloads of fresh fruits, vegetables, and fish from Oregon and Washington, and 351,000 carloads of fresh meats and packinghouse products between points in the United States.

In Ex Parte No. 162 *Increased Railway Rates, Fares, and Charges, 1946*, 266 I. C. C. 537, we authorized an increase of 15 percent, effective January 1, 1947, in the rates and charges for protective service. A like increase was also authorized in the final report in Ex Parte No. 166, decided July 27, 1948, *Increased Freight Rates, 1947*, 270 I. C. C. 403. In Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I. C. C. 9, we declined to authorize an increase in these rates and charges, pointing out that the evidence did not enable us to determine that the present charges, which included substantial increases effective in 1947 and subsequently, were insufficient to compensate the petitioners fully for all costs incident to furnishing these services. In that report it was further pointed out, at page 108, that the actual cost of ice in the year 1948 of $5.69 per ton was only 1 cent higher than the cost in 1946, and that the petitioners' estimated cost for the year 1949 of $6.13 per ton was 13 cents lower than the estimated cost for 1947 of $6.26, which the petitioners relied upon in Ex Parte No. 166.

In Ex Parte No. 175, *Increased Freight Rates, 1951*, 281 I. C. C. 557, we again declined to authorize a further increase in the charges for protective service, indicating that the evidence was not convincing that an increase in the rates and charges for that service was justified. In that report it was pointed out that the cost of ice in 1950, to the selected companies, of $5.84 per ton was only 16 cents higher than the cost in 1946, and that, since then, increases in the charges for protective service amounting to 32.25 percent had been authorized. It was further stated that the cost was also 29 cents lower than the estimated cost for the year 1949 of $6.13 upon which the same petitioners relied in Ex Parte No. 168.

At a joint meeting of the several railroad traffic executive committees representing practically all of the railroads of the country, held on October 3, 1951, it was concluded to conduct a comprehensive study

of the costs of providing refrigeration service for the purpose of determining whether the revenue therefrom was sufficient to cover the entire cost of performing the service, plus a fair return on the investment in facilities devoted to the performance thereof. The National Perishable Freight Committee, hereinafter called the freight committee, was given the responsibility of conducting the study.

Because of the magnitude of the task, the freight committee concluded that the study necessarily should be limited to ascertaining the total costs of ice and salt for all perishable traffic, and the total costs for the complete refrigeration service rendered for a representative number of shipments accorded bunker re-icing service subject to the section 2 charges. It covered the full year of 1951.

A report of the study was submitted to the traffic executive committees on September 30, 1952, which indicated that the service was being performed at a deficit in excess of $12,000,000 per annum based on the test made, which included a total of 13,975 carloads comprising the sample used in the study. It was estimated that the cost on shipments subject to the section 2 charges exceeded the revenue by 29.8 percent, and that the deficits on section 4 shipments would vary depending upon the particular element of expense involved and the territory in which the service is performed. After due consideration of the situation, the executive committees decided, on January 21, 1953, to proceed with the filing of the instant petition with us.

In the development of the data presented herein by the freight committee, the railroads and the Pacific Fruit Express Company, Fruit Growers Express Company, American Refrigerator Transit Company, Burlington Refrigerator Express Company, Western Fruit Express Company, and Merchants Dispatch, Inc., hereinafter referred to collectively as the carlines, were requested to furnish the freight committee certain information called for in an ice-cost formula prepared for that purpose. Generally, it provided for taking, at each station, the sum of the overhead costs, including a return on investment and working capital rental, and depreciation; the direct costs, which are the cost of ice purchased, harvested, or manufactured; and the indirect costs, which include labor on icing platforms, maintenance of facilities, taxes, insurance, et cetera, and dividing the total of these costs by the number of tons of ice placed in cars, to arrive at an average cost per ton of ice at the station. It differed somewhat from the formula developed by us in the second prior proceeding, in that (1) the company haul rate for transporting ice to platforms is increased to 10 mills per ton-mile; (2) interest on working capital is included in the cost study; (3) provision for Federal payroll and income taxes is made; and (4) return on investment is computed at 6 percent of

original cost without deducting accrued depreciation. In addition to these costs, the petitioners' study contemplated the development of data as to the other cost factors, hereinbefore enumerated, which were considered by us in our determinations in the prior proceedings.

The carlines were organized by the various railroads or groups of railroads with the object of rendering more efficient protective service. For example, the Pacific Fruit Express is owned jointly by the Southern Pacific Company and the Union Pacific Railroad Company, and the Fruit Growers Express is owned by 19 eastern and southeastern railroads. Those services are performed for the account of railroads under appropriate contracts. The six carlines and The Atchison, Topeka and Santa Fe Railway Company, hereinafter called the Santa Fe, which maintains a refrigerator department, provide by far the greater number of refrigerator cars in this country.

Every carrier listing 1 or more icing stations on its lines, and the 6 carlines, were requested to report the cost of all ice and salt supplied for refrigeration of perishable freight. A total of 1,678 locations on 124 railroads were covered by the more than 2,000 reports of the carriers.

Petitioners' traffic study.—In the study of the section 2 charges and costs, a total of 13,975 shipments subject to that section were selected as representative. They were selected from all shipments originated on the Santa Fe, the International-Great Northern Railroad Company (Guy A. Thompson, trustee), The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, trustee), and the other railroads that originate the great bulk of the perishable traffic. With the view of obtaining a sample approximating 10 percent of the shipments accorded bunker re-icing service, the procedure set up by the freight committee required the inclusion of selected shipments in refrigerator cars having numbers terminating in the digit 5. The selection of the origin and destination territories was designed to embrace a major portion of all refrigerated traffic. They are listed below:

Origin territory	Destination territory
rizona, Arkansas, California, Colorado, Idaho, Oregon, Texas, Utah, and Washington.	Missouri groups 1 (St. Louis) and 2 (Kansas City); Minnesota group 1 (St. Paul-Minneapolis); Illinois group 2 and Indiana group 4 (Chicago); Ohio group 3 (Cleveland), Michigan group 4 (Detroit), New York group 1 (Buffalo) and Pennsylvania group 1 (Pittsburgh), consolidated into one reporting group; New York group 3 (New York City), Delaware, the District of Columbia, Maryland group 3 (Baltimore), New Jersey group 1 (Jersey City), and Pennsylvania group 4 (Philadelphia), consolidated as one reporting group; Massachusetts group 1 (Boston).
ew York	Primary markets of Chicago and east, and St. Louis, Kansas City and St. Paul-Minneapolis, wherever records disclosed substantial movement.
labama, Florida, Georgia, North Carolina, South Carolina, Tennessee, and Virginia.	Same destination territory as from western origins, also Atlanta, Ga., Birmingham, Ala., and Cincinnati, Ohio, wherever records disclose substantial movement.

The sample was selected in the following manner by the designated originating carriers:

	Number of shipments
All section 2 shipments from selected producing areas	414,416
Shipments in cars with numbers ending in digit "5" selected therefrom	41,258
Shipments other than to major destinations, excluded	18,870
Leaving those to the major destinations	22,388
Rule 240, rule 242, and rule 243 shipments, excluded	8,832
Remaining shipments accorded bunker re-icing services from and to major origin and destinations	13,556
Digit 5 shipments on other lines, included	419
Total shipments in sample	13,975

Of the 13,975 section 2 shipments, 9,442, or 67.56 percent of the total, were accorded standard refrigeration service. For those shipments, the reported aggregate cost of ice, total refrigeration cost, total revenue collected, and the resulting deficits were $844,805, $1,348,872, $1,032,925, and $315,947, respectively. Each of the remaining 4,533 section 2 shipments was accorded one of the so-called modified services. For those shipments, the cost of ice, total refrigeration cost, and the revenue collected were $278,784, $428,275, and $336,043, respectively, indicating a revenue deficit of $92,232. The aggregate deficit of $408,179 on the selected section 2 shipments amounted to 29.8 percent of the aggregate revenue of $1,368,968. Segregated by origin territories, the resulting numbers of shipments were 9,443 from the West, 67 from New York, and 4,465 from the Southeast, and the percentages of the indicated revenue deficits were 31.6, 22.6, and 27.9, respectively. The cost data presented in this proceeding will be discussed hereinafter in greater detail.

The items of expense, as computed in the carriers' study, and the percentage relation of each to the total cost are shown in the table below:

Cost factor	Amount	Percentage of total
Ice	$1,124,301.35	63.3
Salt	73,529.26	4.1
Switching	135,448.93	7.6
Supervision	159,746.19	9.0
Ice haulage	163,500.91	9.2
Bunker damage	92,368.14	5.2
Station and auditors accounting	13,414.08	.8
Hazard	5,169.94	.3
Precooling	9,668.01	.5
Total	$1,777,146.81	100

A major portion of the 9,443 shipments from the West, principally from origins in Arizona, California, Colorado, Idaho, Oregon, Texas, Utah, and Washington originated on the contract lines of the Pacific Fruit Express and on the lines of the Santa Fe, which amounted to 6,597 and 2,477 shipments, respectively, or a total of 9,074. During the study period, a total of 247,851 section 2 shipments originated on the contract lines of the Pacific Fruit Express, of which 122,785 were accorded bunker re-icing service. The 6,597 selected shipments, or so-called digit 5 shipments, amount to 5.37 percent of the latter number. Table 1 below shows a segregation of that data by commodities. Table 2 shows similar information as to shipments originated on the lines of the Santa Fe. Table 3 shows like information as to the 86,937 section 2 shipments originated on the contract lines of the Fruit Growers Express, of which 4,482 digit 5 shipments amount to 7.57 percent of the total.

Commodity	Section 2 shipments	Shipments re-iced	Digit 5 shipments	Ratio digit 5 to re-iced shipments
Table 1				*Percent*
Citrus fruits	30,001	23,676	1,321	5.58
Grapes	17,523	17,207	1,013	5.89
Deciduous fruits, except apples	19,065	16,530	1,005	6.08
Apples	2,800	1,556	35	2.25
Melons	24,784	24,738	1,483	5.99
Lettuce	56,609	3,786	195	5.15
Potatoes	26,569	21,411	878	4.10
Tomatoes	10,227	3,410	168	4.93
Other vegetables	53,877	4,075	200	4.91
Frozen commodities	6,396	6,396	299	4.67
Total	247,851	122,785	6,597	5.37
Table 2				
Citrus fruits	24,501	18,347	876	4.77
Grapes	11,242	10,977	566	5.16
Deciduous fruits, except apples	3,333	3,230	192	5.94
Apples	none	none	none	
Melons	5,733	5,718	343	6.00
Lettuce	9,432	2	none	
Potatoes	15,107	13,345	414	3.10
Tomatoes	556	329	9	2.74
Other vegetables	8,383	516	21	4.07
Frozen commodities	1,341	1,341	56	4.18
Total	79,628	53,805	2,477	4.60
Table 3				
Deciduous fruits, except apples	9,540	9,539	732	7.67
Apples	444	150	1	.67
Citrus fruits	25,110	21,056	1,534	7.29
Pineapples	87	38	2	5.26
Evergreens	24	4	none	
Frozen commodities	1,879	1,864	163	8.74
Berries	35	35	1	2.86
Lettuce, escarole	2,207	853	86	10.08
Potatoes	5,745	2,296	156	6.79
Tomatoes	6,306	3,378	270	7.99
Other vegetables	35,111	19,711	1,520	7.71
Melons	12	3	none	
Fruit juices (not frozen)	424	290	17	5.86
Mixed fruits and vegetables	13	6	none	
Total	86,937	59,223	4,482	7.57

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The protestants generally contend that the sample obtained by the carriers does not meet the basic requirements of probability-sampling of the affected traffic, and is deficient and unreliable in various respects for the purpose intended in that, for example, it contains a disproportionately large number of shipments accorded standard refrigeration service, which amounted to approximately 67 percent of the total sample; that it does not include any shipments moved under any of the various modified services, such as rule 240, where no bunker re-icing service was performed; that it is overloaded with long-haul shipments; that it is not proportionate as to the numerous commodities affected; that it excludes many origin and destination areas; and that the year selected was not representative.

Evidence presented by the protestants in support of their position concerning the inadequacy of the carriers' sample traffic study includes, among other things, various comparisons of the results thereof with those taken from a 1-percent waybill analysis covering the same period, made for general use by the Commission's Bureau of Transport Economics and Statistics, hereinafter referred to as the waybill study. The sample in the waybill study was initially selected on the basis of waybills numbered "1" and those with the terminating digits "01."

The difficulties encountered in the use of these two samples are apparent when their basic methods of selection are considered. Although fully aware of the requirements in probability sampling of covering all the affected traffic, all the carriers, and all origin and destination areas, the petitioners found it expedient to limit their actual study to selected carriers and for selected traffic between a limited number of areas. This initial selection of carriers and areas was based upon judgment and so must be considered as a judgment sample from the total traffic of all carriers in all areas. The protestants argue that there is no method of proving the representativeness of a judgment sample since it is necessarily based upon opinion. After selecting the traffic, carriers, and areas to be covered, the petitioners then took a probability sample of that traffic by the described means of the terminating digit in the car number. They rely upon it as being representative of the total body of traffic. It should, and apparently did, produce a valid sample of the traffic thus selected. Further consideration will be hereinafter given to its representativeness of the total traffic.

In some of the protestants' comparisons, the annual volume of shipments of fresh fruits and vegetables and frozen food products originated or terminated on class I railroads in the United States is stated and segregated by commodities, and the relative proportions of the

total reflected by the samples in the carriers' traffic study and in the waybill study are given. Of the total shipments of apples originated, the respective relative proportions included in the carriers' traffic sample and in the waybill study are 0.42 and 0.91 percent, and of the shipments of potatoes they are 0.60 and 0.90 percent. With respect to other fruits and vegetables, the relative proportions reflected by the carriers' sample exceed those embraced in the waybill study in all instances, being most pronounced as to melons, fresh fruits, and frozen food products. The greatest disparity shown is in connection with fresh fruits n. o. s.,[3] not frozen, for which the respective proportions are 8.48 and 0.78 percent.

The protestants contend that the carriers' sample is overweighted as to fruits, melons, and frozen food products, which constitute approximately 66 percent of the total sample as compared with 32 percent of the total sample in the waybill study. They point out that, although vegetables comprise approximately 60 percent of the total volume of fruits and vegetable shipments, the proportion of vegetables reflected by the carriers' sample is only about 29 percent. They show, for example, that as to shipments of potatoes, which amount to about 31 percent of the total volume of fruits and vegetables terminated in the United States, the proportion of those shipments in the carriers' sample is only about 9 percent, as compared with 31 percent in the waybill study. The protestants argue that the disparities between the carriers' sample and that in the waybill study, which was obtained through the accepted method of probability-sampling over the whole body of traffic, indicated by the foregoing comparisons, support their contention that the carrier's sample is deficient and unreliable. Regarding this comparison, however, the samples gathered in the waybill study were not confined to shipments of fruits and vegetables accorded refrigeration service, but included many shipments moved under other types of services, and are not directly comparable as to the affected traffic, a notable example being potatoes which move also under ventilation or heater service.

Concerning the claim that the carriers' sample contains a greater portion of high revenue-deficit commodities than normally would be found in the section 2 traffic as a whole, there is shown in the table below a comparison of the distribution, by commodities, of the carriers' sample and the computed revenue losses thereon, and similar data as to shipments embraced in the waybill study, the latter being expanded 5.65 times to make them comparable as to volume.

[3] Not otherwise specified by name.

Commodity	Shipments in carriers' sample			Shipments in waybill study		
	Number of carloads in petitioners' sample	Loss by commodities	Loss per car	Carloads in waybill study	Waybill study expanded to number of cars in petitioners' sample	Loss on shipments distributed among commodities as in waybill study
Apples	131	$1,946.80	$14.86	93	525	$7,802
Melons	1,831	50,926.35	27.81	283	1,599	44,468
Total fruit	3,618	93,206.38	25.76	518	2,927	75,400
Citrus	3,731	87,605.55	23.48	611	3,453	81,076
Vegetables	2,521	39,905.08	15.83	256	1,447	22,906
Potatoes	1,294	64,046.12	49.49	447	2,526	125,012
Tomatoes	240	6,804.45	28.35	78	441	12,502
Frozen foods	568	62,902.58	110.74	186	1,051	116,388
Miscellaneous	41	835.95	20.39	1	6	122
Total	13,975	408,179.26	.....	2,473	13,975	485,676

Loss shown by petitioners 408,179
Amount of understatement of loss by petitioners based on this comparison 77,497

It will be observed from the foregoing table that the volume of frozen food shipments in the waybill study, said to be high-deficit traffic, is almost double that contained in the carriers' sample. The comparison also indicates that the cost data developed by the petitioners understates the costs as to those commodities.

It is stated that, although 29 percent of the melon shipments originate in the southern district, none of them is included in the carriers' sample. It appears that practically all shipments of melons from that district consist of watermelons, which do not ordinarily move under refrigeration. Cantaloups, which do normally require refrigeration, originate, for the most part, in the western district, and principally in the central western district where about 62 percent of the total volume of shipments originate. About 99 percent of the total shipments of melons included in the carriers' sample originated in the central western district, which the protestants suggest is disproportionately large for that district. It is not shown that a better proportioned sample would have produced materially different results as to unit costs from those indicated by the sample taken.

The protestants further observe that, although 20 percent of the total volume of grapes, peaches, and pears originates in the territory east of the Mississippi River, none of those shipments is included in the carriers' sample, but as to fruits n. o. s., not frozen, of which only about 10 percent originated in the southern district, the proportion from that district reflected by the carriers' sample is approximately 72 percent of the total volume. In another example they show that of the total volume of fresh vegetables, of which 76 percent originated in the western district and 21 percent in the southern district, the proportion from the southern district, picked up by the carriers' sample, is 80 percent, and only about 18 percent from the western

district. In summarizing their analysis, the protestants indicate that the carriers' traffic study is shown to be underweighted from the western district, extremely underweighted from the eastern district, and overweighted from the southern district.

In regard to the alleged overloading of the carriers' sample with long-haul shipments, the protestants show, for example, that 54.36 percent of the shipments in that sample originated in Florida or California and moved to destinations in New York or Ohio. Those from California to destinations in New York alone, amounting to 3,383 out of the total sample of 13,975 shipments, constituted 24.21 percent thereof, as compared with 353 carloads out of a total of 6,381 carloads in the waybill study, or 5.53 percent thereof. Of the total number of shipments in the carriers' sample, 43.46 percent terminated at points in the New York group, as compared with only 12.65 percent of those in the waybill study. As pointed out by the protestants, more than 90 percent of the shipments in the carriers' sample terminated in the eastern district.

In connection with the allegation that the carriers' sample is overloaded with long-haul shipments accorded standard refrigeration, there is the contention that such traffic shows large deficits in revenue, and that the inclusion of a disproportionately large sample of those shipments tends to produce an inflated factor for use in computing an average cost for national application to the whole body of section 2 traffic. Some of the protestants point out that the petitioners' cost study itself shows numerous instances where the revenue from some of the modified services yields profits. Pursuant thereto, the petitioners presented data depicting the revenue situation as to the various services rendered in the movement of 2,319 shipments referred to by the protestants. They show for the services rendered the distribution of shipments, and the computed deficits in percentages for full-bunker refrigeration, respectively, as follows: Standard refrigeration, 1,599 and 30.6; rule 239, 66 and 24.1; rule 245, 63 and 12.2; rule 247, 273 and 33.7; rule 249, 54 and 7.2; rule 251, 193 and 12.3; rule 252, 2 and 6.7; rule 254, 54 and 22.1; and rule 258, 7 and 23.6; or an average of 27.9 percent. For 54 additional shipments the deficits for half-stage refrigeration service averaged 42.9 percent, and for the composite of the 2,473 shipments the deficits averaged 28.9 percent. The deficits by commodities included in those shipments ranged from a minimum of 12.75 percent for apples to a maximum of 76.77 percent for frozen foods. In the establishment of a structure of charges of national scope, it is impracticable to accomplish uniformity in the relation to costs. The table below shows the distribution of those shipments, by services, and their percentage relations to the stated total compared with similar data compiled from the waybill study. It will be seen

from these comparisons that the relative distribution, among services, reflected by the carrier's sample approximates that in the waybill study.

Type of service	Number of shipments		Percent of total	
	Waybill study	Carriers' sample	Waybill study	Carriers' sample
			Percent	*Percent*
Standard refrigeration	1,738	10,417	70.3	74.6
Rule 239	71	461	2.9	3.3
Rule 245	66	546	2.6	3.9
Rule 247	279	953	11.3	6.8
Rule 249	54	311	2.2	2.2
Rules 251 and 252	195	823	7.9	5.9
Rule 254	55	325	2.2	2.3
Rule 258	15	139	.6	1.0
Total	2,473	13,975	100.0	100.0

In regard to the alleged disproportions in the carriers' sample as between the various refrigeration services performed, the protestants compare the proportions in that sample with those in the waybill study. The 9,442 shipments in the carriers' sample that moved under standard refrigeration, as hereinbefore noted, were 67.56 percent of the total sample, as compared with the 1,599 carloads out of the total of 6,381 in the waybill study, or only 25.06 percent thereof. As to other services, comparisons of the carriers' sample and the waybill study do not disclose substantial differences, percentagewise, between the result of the two studies, except as to rule 240 and services other than refrigeration. Included in the total number of shipments in the waybill study are 984 that moved under rule 240 service and 2,905 which were not accorded any refrigeration service, representing 15.42 and 45.43 percent, respectively, of the total, with no similar shipments in the carriers' sample. The inclusion of shipments not moving under refrigeration distorts the percentage relations of the various types of refrigeration under consideration.

Some of the protestants object to the exclusion of rule 240, 242, and 243 shipments from the carriers' sample, laying particular emphasis on the large number of such shipments, as indicated by the table on page 512 hereof, which approximated 43 percent of the total. Such shipments are iced initially by the shipper and are not re-iced in transit. Therefore, the amount of service given them and the revenue therefrom are minor compared with bunker re-iced shipments. Although the number of excluded shipments appears large, the revenues and costs are relatively small, indicated by the petitioners to be less than 2 percent of the total.

The 4 elements of cost of providing rule 240 service, for example, are hazard, station and auditors accounting, and bunker repairs,

whereas there are 9 elements of cost in bunker re-iced service. It is not apparent that the unit costs of providing the individual elements of service are different for the various services or that the exclusion of those shipments has any material effect upon the overall results under the carriers' sample. The percentages in the waybill study recomputed for each of the various services embraced therein, exclusive of rule 240 shipments and those not accorded refrigeration, are comparable with those shown in the carriers' sample as illustrated by the foregoing table.

With the advent of vacuum precooling and the described changes in packaging since 1951, there has been, as herein noted, an important shift from the use of modified services to standard refrigeration from origins in Texas, Arizona, and California, tending to minimize any deficiency of the traffic sample resulting from the exclusion of shipments not accorded re-icing in transit. A notable example is the shift from rule 242 service to standard refrigeration in the movement of lettuce and carrots from Arizona and California. There has been a sharp increase also in the use of half-stage refrigeration service, from a total of 13,008 shipments originated on the lines of contract carriers of the Pacific Fruit Express in 1951 to 26,811 in 1953 and 34,420 in 1954. The revenue deficit estimated by petitioners, in the rendition of that service, 44.8 percent, is represented as being relatively greater than that incurred in connection with any of the other services. With the increased volume of traffic accorded that service since 1951, they argue that the deficits must have increased.

Also concerning the distribution of shipments embraced in the carriers' sample, the table below shows recapitulations (segregated by lengths of hauls graduated by 500-mile blocks) of the volume of shipments, cost of performing the refrigeration services accorded, the revenue therefrom, the indicated loss in revenue, and its percentage relation to the total revenue for the respective mileage groups:

Distance	Number of shipments	Relation to total	Cost	Revenue	Loss	Relation of loss to total revenue
		Percent				*Percent*
Under 500 miles	69	0.49	$6,372.24	$5,356.71	$1,015.53	19.0
500 to 999 miles	1,028	7.35	111,413.37	87,482.11	23,931.26	27.4
1,000 to 1,499 miles	3,482	24.92	342,712.46	266,188.40	76,524.06	28.7
1,500 to 1,999 miles	594	4.25	72,904.15	51,512.09	21,392.06	41.5
2,000 to 2,499 miles	1,945	13.92	244,323.17	185,464.20	58,858.97	31.7
2,500 to 2,999 miles	2,335	16.71	321,268.03	239,594.20	81,673.83	34.1
3,000 to 3,499 miles	4,227	30.25	626,818.35	493,545.93	133,272.42	27.0
3,500 miles and over	295	2.11	51,335.04	39,822.93	11,512.11	28.8
Total	13,975	100.00	1,777,146.81	1,368,966.57	408,108.24	[1] 29.8

[1] Average.

Except for hauls under 500 miles and those within the 1,500 to 1,999 mileage group, the ratios of losses shown in the above table do not vary substantially. The results of the sample are relatively unaffected by short-haul traffic because the percentage of loss does not progress according to length of haul, as indicated by the foregoing table, and because there is relatively little section 2 traffic accorded bunker reicing service for hauls of less than 500 miles.

A tabulation for 1,000-mile groups shows the following results:

Distance	Number of shipments	Relation of loss to total revenue
		Percent
Under 1,000 miles	1,097	27
1,000 to 1,999 miles	4,076	31
2,000 to 2,999 miles	4,280	34
3,000 miles and over	4,522	27
Total	13,975	Average 30

The above figures indicate that, if a greater part of the sample had consisted of shorter movements, the percentage of loss would have changed very little. Considering its nationwide scope and the overall results of the traffic test, together with the variations in costs prevailing in the several groups through which the sample shipments moved, it does not appear that these variations exceed reasonable tolerances or that the costs for the longer hauls are improperly related to those for the shorter hauls.

In support of their position that the carriers' sample is not representative, the protestants presented data concerning the volume of deliveries of certain vegetables originated at points in Florida, Arizona, and California, and terminated at 100 specified cities (in 39 States, the District of Columbia, and inclusive of 5 cities in Canada), for each of the years 1931 through 1952, except vegetables from Arizona and California for the years 1937 through 1949. These cities embrace the 29 from Florida and 19 from California, used in the carriers' sample. From the Florida origins, the total of such deliveries to these 29 cities was 86.8 percent of the total to the 100 cities during the 16-year period covered, and from the Arizona and California origins to the 19 cities the total thereof during the 9-year period was 65.06 percent of the total to the 100 cities. These percentages indicate that a great preponderance of the movement of the commodities considered is to the destinations used by the carriers in their study.

Because of the freezing weather in Texas and the Kansas-Missouri flood conditions that occurred in 1951, together with subsequent changes in packaging and the advent of vacuum precooling, discussed

elsewhere herein in greater detail, it is claimed that the study period selected was not representative. The freeze caused some shrinkage in the volume of refrigerated traffic from Texas. Although there is some indication that the unit costs at certain stations are affected slightly by fluctuations in the volume of refrigeration operations, it is not indicated that the aforementioned shrinkage in traffic caused any appreciable change in the unit costs thereof.

The flood conditions caused delays to 61 shipments originated by the Santa Fe and 126 originated by the carriers served by the Pacific Fruit Express, which resulted in additional refrigeration expense. They represented about 2 percent of the study traffic of those carriers. If distributed over all that traffic, the additional ice consumed, as a result of the delays, would amount to only about 130 pounds per car. Any inflationary effect upon the overall costs caused by that additional expense would be extremely small. The petitioners maintain that operations in the railroad industry are such that no year is free from disruptions of some kind, and they cite typical examples of disruptions in other years from various causes, such as strikes and earthquakes. It does not appear that 1951 was an abnormal year for the purpose of the study.

Since 1951, as noted, there has been a substantial shift to the use of standard refrigeration as a result of the described changes in packaging and precooling, tending to enhance the representativeness of the sample as to that service, which the protestants contend was disproportionately large.

The petitioners' study afforded no mathematical chance for all of the railroads, all origin and destination areas, and all of the affected traffic to be included, and may have rendered it unrepresentative as to the whole body of traffic. The sample, however, was used principally to weigh unit costs for the purpose of determining an average percentage increase in refrigeration charges for section 2 traffic. The origin and destination areas selected produce and consume, respectively, a majority of all fruits and vegetables shipped, and a great preponderance of the movement of that traffic is over a relatively few routes. This concentration of movement and the resulting heavier volume of icing operations tend to produce lower unit costs than prevail in connection with the traffic to, from, or between the excluded areas where the volume of movement is much less. Thus, the conclusion is warranted that the computed costs of performing the refrigeration service required in the movement of the selected shipments do not overstate the average costs for the traffic as a whole.

Position of the protestants.—Of the numerous parties appearing in opposition to the proposed increased charges, evidence was presented

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by the Growers and Shippers League of Florida, Florida Fruit and Vegetable Association, Stokely Van Camp, Inc., National Association of Fruit Packers, Texas Citrus and Vegetable Growers and Shippers, F. H. Vahlsing, Inc., of Texas, the Western Growers Association, California Citrus League, California Grape and Tree Fruit League, Northwest Horticultural Council, Washington Potato and Onion Shippers Association, Northwest Fish Traffic Committee, the principal meatpackers, and the United States Department of Agriculture. This representation embraces practically all the growers, shippers, and processors of fruits, fruit juices and concentrates, vegetables, and frozen foods in Florida, Texas, Arizona, California, Oregon, and Washington, and fresh meats and packinghouse products throughout the country.

It is the position of these protestants that, considering the overall result of the present charges, there is no warrant for any increase therein, and that the charges proposed would affect adversely both the carriers and the shippers, it being their contention that the perishable traffic affected cannot bear an additional burden. In support of their position, they presented evidence concerning, among other things, the deteriorating economic condition of the producers, the shrinking per capita consumption of certain fruits and vegetables over a long period of years, attributed to the rising costs thereof, and the rapidly increasing volume of perishable traffic diverted to motor vehicles.

The Northwest Fish Traffic Committee and the Washington Potato and Onion Shippers Association would not oppose a reasonable increase shown to be justified upon substantial evidence. They do, however, request the elimination of certain alleged inequities in the refrigeration charges so that they may be on a competitive basis with other shippers in the same general area. For example, they claim that fresh fish from Prince Rupert, British Columbia, Canada, is given an advantage over that from the Puget Sound region, amounting to $30 or $40 per car, which would be $100 with the increase proposed. It is claimed that the Washington potato shippers are in a disadvantageous competitive position in relation to those in Oregon and Idaho because of the lower switching charge per icing in Oregon and the more favorable refrigeration charges from Idaho.

The Western Growers Association requests that the Arizona and California vegetable shippers be given the privilege of initially icing all cars in which their shipments are loaded, regardless of the type of service used, instead of being limited to those moving under certain of the modified services as at present. Somewhat similar requests were made by Texas and Florida shippers. The Texas shippers also urged that the carriers be required to make available to them rule 247

service maintained from other producing districts, which has subsequently been established. Consideration of such requests would unduly broaden the issues presented in this proceeding.

The Arizona and California shippers of vegetables and deciduous fruits also request that, if an increase is authorized, a holddown be prescribed sufficient to maintain their present competitive relation to other producing districts. Such treatment would be contrary to our indicated purpose in the determination of charges, as nearly as practicable, sufficient to cover the cost of providing refrigeration services. An adjustment of that nature, if appropriate, should be accomplished by modification of the line-haul rates.

An objection by the petitioners to the presentation of evidence on behalf of the Western Growers Association concerning car-mileage revenue received by the carlines or railroads for the use of their refrigerator cars was sustained by the examiner, and thereafter, upon request, counsel for those shippers was permitted to present proof for our consideration. It consisted merely of a statement as to the car-mileage revenue which the carlines would receive, for example, for a 2,000-mile round-trip movement of a refrigerator car at 4 cents a mile. Revenue received for car service is not a factor in the determination of reasonable charges for refrigeration service.

An overruled objection to the receipt in evidence of the petitioners' exhibits Nos. 4, 5, 6, 7, 8, 9, 19, 20, and 21, as amended, interposed by counsel for the Western Growers Association, on the grounds that he was not afforded a "reasonable opportunity to examine both the documents and the abstract," as contemplated by the provisions of rule 83 of our General Rules of Practice, is renewed on brief. Those exhibits were compiled from voluminous detailed cost data and are basic to the entire cost study. They were introduced at the initial hearing on December 9, 1933, but were not received in evidence until after the completion of cross-examination thereon during the following hearing more than 2 months later, and after the underlying data had been made available for examination. This procedure afforded all parties a reasonable opportunity to examine both the documents and the abstract. The ruling is sustained.

The section 2 charges, as noted, cover the several enumerated elements of expense, while the section 4 charges cover only the elements of ice, salt, and switching. The elements of expense for supervision, station and auditors accounting, and ice haulage, which are covered by the section 2 charges, but not included in the section 4 charges, amount to about 19 percent thereof. The section 2 shippers, generally, allege that the subjection of their traffic to charges for those elements without subjecting section 4 traffic to like treatment, causes unjust

discrimination against their traffic and gives undue preference of section 4 traffic.

After extensive investigations in the prior proceedings, we made definite determinations as to the costs of the several elements of expense and required the establishment of charges accessorial to the line-haul rates to compensate those costs on both section 2 and section 4 traffic. The section 2 charges became effective and have been applied for many years, but because our order as to the section 4 charges for the elements stated was stayed temporarily by the United States District Court for the Northern District of Illinois, and was subsequently vacated, those charges never became effective.

Concerning the allegation of discrimination, it is noted that the section 2 and section 4 charges do not apply on like traffic, and that, as to the alleged undue prejudice, there is no showing that any failure of the section 4 charges to cover the above-mentioned elements has caused, or is likely to cause, any disadvantage or injury to the section 2 traffic or any shippers thereof. Thus, the claim of unjust discrimination or undue preference is not soundly based. In these circumstances, any existing deficiency in the section 4 charges does not relieve section 2 traffic of the responsibility of bearing the full cost of that service and is not a consideration in the determination of the lawfulness of the increase proposed in the section 2 charges.

Cost of ice.—The cost to the carriers of supplying ice in the performance of refrigeration service is much the largest of the several elements of expense enumerated. It amounted, for example, to 63.3 percent of the total cost of the refrigeration service rendered in connection with the sample section 2 shipments, herein described, for which only "bunker ice" was supplied. So-called "body ice," and ice placed in bunkers by shippers is not included in this computation. The increases proposed are intended to cover the cost of both body and bunker ice supplied by the carriers.

Ice used by the carriers in rendering refrigeration service is either placed in the bunkers or bodies of refrigerator cars by themselves from supplies which they have manufactured, harvested, or purchased and stored in icehouses adjacent to icing platforms, or by contractors at a price per ton as agreed upon. The carriers manufacture ice at only a few points, the great bulk of their requirements being supplied by contractors who, in most instances, also place it in the bunkers. The harvesting of natural ice became uneconomical and has practically ceased.

The Santa Fe maintains its own refrigeration department. Other railroads' responsibilities as to refrigeration are discharged for their account, under contract, by carlines directly, or through them by inde-

pendent contractors. A substantial portion of the Santa Fe's service is performed also by independent contractors. Those contractors are generally commercial concerns doing a general ice business but, in a number of instances, under long-term contracts with the carriers, they have built plants within railroad yards. These plants are usually not so situated as to be suitable for serving the general public.

Some of the protestants introduced evidence purporting to show that, in many instances, the contract prices of ice were excessive. These prices per ton, which may vary widely as between individual stations, are represented by the carriers as being influenced by the conditions existing at each station, such as the volume of ice used, the investment in facilities, labor and other costs, ice shrinkage, and the required purchase of minimum quantities of ice at certain stations in order to insure the maintenance of supplies sufficient to meet all requirements. The failure to use the contract quantity may result from unforecastable conditions, such as crop failures and variations in the volume of consumption, or because of the necessity of providing compensation sufficient to induce contractors to invest in the plants and equipment necessary to meet the contemplated requirements where no other ice is available. Owing to inadequate supplies or variations in requirements at a station, there are instances when it must obtain ice from some other point. The evidence does not warrant a conclusion that the carriers have not exercised due diligence in negotiating the contracts.

Some of the shippers of fruits and vegetables contend that the computation of section 2 costs should be based upon the cost of ice on a statewide rather than a territorial group average used by the carriers. They computed costs for either all or representative shipments included in the carriers' sample from Florida, Texas, Arizona, and California using, in some instances, the same basis as was employed by the carriers and, in others, the actual cost of ice at each icing station. The computed deficit in revenue on 1,371 carloads of fruits and vegetables moved from Florida under standard refrigeration, including both those with salt and those without salt, using the group-average costs of ice, amounted to 21.3 percent. Similar computations for representative shipments given standard refrigeration service, or a modified service under rule 240, rule 251, or rule 252, showed revenue results ranging from a maximum profit of 9.12 percent to a maximum deficit of 28.91 percent.

Computations were made by Texas shippers as to 97 carloads of fruits and vegetables from that State, based on the cost of ice at individual icing stations, which indicate a revenue deficit of 29.7 percent as compared with a deficit of 40 percent indicated by the carriers'

computations. They also show computations, on the same basis, for a few shipments accorded standard refrigeration service, or rule 247 service, indicating deficits ranging from 6.79 to 7.57 percent.

The Arizona and California shippers presented recapitulations of the carriers' claimed costs of rendering the various refrigeration services for 2,197 carloads of citrus fruit from those States embraced in the carriers' sample, the revenue thereon, and the resulting deficits as shown in the carriers' computations. The respective deficits on shipments accorded standard refrigeration service, the various modified services, and on all the services used are indicated as 41.79, 15.34, and 28.07 percent.

In prescribing charges for ice on a group or zone basis, rather than by individual stations, we gave consideration to proposals of shippers similar to the contentions advanced herein. The cost data developed in the prior proceedings, like that herein, disclosed that, in numerous instances, the cost of ice varied substantially as between individual icing stations, but that the practical necessity of publishing charges on the group basis was recognized. The shippers' proposals as to the method of arriving at charges were regarded as being based upon an inadequate conception of the scope of the present-day refrigeration service. We then observed that the handling of refrigerated traffic should be considered as an integrated national service, and, when so considered, it was clear that charges should be fitted to its support by the use of the group basis, and that the shippers' proposals were incompatible with that view. No modification of that determination is warranted by the evidence in this proceeding.

The ice-cost formula is designed to develop at each icing station the cost of (1) ice per ton to the carrier, whether purchased, manufactured, or harvested, (2) moving ice to the icing platform, (3) operation of the icing platforms, and (4) placement of the ice in the refrigerator cars. It includes such elements as return on investment, depreciation, interest on working capital, cost of transporting ice to platforms, labor of icing cars, indirect costs, and taxes. The data reported by the carriers for the section 2 traffic sample were developed in accordance with that objective, and the procedures and resulting computations will be discussed in sufficient detail below.

The table below shows a summary of the reported aggregate tonnage and the computed cost of ice supplied in bunkers of cars, segregated by territorial groups, the average cost thereof per ton, the section 4 charge per ton, and the amount of the deficiency of such charge in each group. As to ice supplied in bodies of cars, it shows the total tonnage for all territories, total cost thereof, average cost per ton, the section 4 charge and the deficiency of the charge. The

areas embraced in the groups listed below are the same as those in the corresponding groups defined in the perishable protective tariff.

Territory	Amount supplied	Cost	Average cost	Section 14 charge	Deficiency
Funker ice	*Tons*		*Per ton*	*Per ton*	*Per ton*
Group 1	1,388,929	$7,042,866	$5.07	$4.04	$1.03
Group 2	184,096	1,601,172	8.70	4.96	3.74
Group 3	378,218	3,153,370	8.34	5.43	2.91
Group 4	447,633	2,555,990	5.71	5.49	.22
Group 5	272,506	1,887,356	6.93	5.62	1.31
Group 6	280,142	1,944,557	6.73	5.69	1.04
Group 7	729,262	5,145,240	7.06	5.75	1.31
Group 8	763,686	5,368,509	7.03	6.01	1.02
Group 9	285,616	2,217,761	7.76	6.28	1.48
Group 10	438,977	3,142,765	7.16	6.68	.48
Pody ice					
All territories	126,953	1,066,738	8.39	6.61	1.78
Total	5,305,018	35,126,324			

The cost of ice, computed by the carriers, includes an item representing 6 percent of original cost without deducting related depreciation reserves. In lieu of conducting valuation studies at each station, which they claim would have been too expensive, the petitioners presented data to show that reproduction cost less depreciation, computed on the basis of studies of the condition percent made by the Commission's engineering section, is greater than the original cost, which they used.

The protestants generally used a rate of 4 percent for return, pointing out that, over a long period of years, the carriers' average net return for all their operations has not exceeded that amount. In the restatement by one group, the base for return was original cost less accrued depreciation on the base of an engineering condition percent (56). The base used by the other group was original cost reduced by a depreciation reserve computed on the basis of a 4-percent depreciation accrual each year since acquisition of the property. The protestants contend that the 4-percent rate should be applied to a base which is the original cost of all property, other than land, less the cost of any of such property over 25 years old.

After careful consideration of all facts herein contained, including appreciation, depreciation, going-concern value, but excluding working capital, which is considered separately hereinafter, and all other matters which appear to have a bearing upon the valuation, the value as of December 31, 1951, for the purpose of this proceeding, of the property owned or used by petitioners for furnishing refrigeration services is found to be $22,484,000, and this amount will be used in the restatement of ice costs.

The return on facilities devoted to the performance of refrigeration service should not be expected to exceed the average rate for all opera-

tions of the class I railroads as a whole. The allowance for return in the restatement, hereinafter, will be computed at a rate of 4 percent after Federal income taxes. In computing the allowance for Federal income taxes, fixed charges were taken into consideration.

The primary purpose of any system of depreciation is to recover (or charge to cost of operation) the full original cost of property through periodic charges to operating expenses during the service life of the property. The rate of 4 percent used in the ice-cost formula contemplated the group plan of depreciation based on a weighted-average service life of 25 years, which is based on varying service lives. Under the group plan, property which is destroyed, retired, or otherwise withdrawn from service is taken out of the base on which the depreciation charge is computed, but all property which remains in service continues to be subject to depreciation regardless of the amount reflected in the depreciation reserve.

The protestants propose to modify the group plan used in the ice-cost formula by discontinuing depreciation on property older than 25 years. Under this modification the full original cost would be charged off on property which reaches 25 years of age, but on property with a shorter life which is retired before 25 years, the full original cost is never recovered through charges to operating expenses and the cost is understated. For this reason, under the group plan of depreciation, all property in service regardless of its age should continue subject to depreciation.

Included in the carriers' computations is an item of return, at the annual rate of 6 percent for one-sixth of a year, on the working capital said to be required in the performance of icing operations at each of the numerous icing stations maintained. The determination of the period used in the computations was based upon the representation that there is a time lag of approximately 2 months from the time an icing service is rendered until payment therefor is received from the connecting carriers. The amount of the working capital allocated to each icing station, reflecting one-sixth of the annual expense of operating the station, is designed to provide funds sufficient to cover operating expenses during those periods.

Under the established procedure of effecting payment to the participating carriers for icing service performed by them, the total refrigeration charge collected at the destination, less the amount accruing for ice haulage, station and auditors accounting, and hazard, which is retained by the delivering carrier, is credited by it to the originating carrier and paid to the latter in the next interline settlement. Thereafter, upon receipt of bills, distribution of portions of that residue is then made by the originating carrier to other participating carriers on the basis of the amounts published in the governing

division sheet. The amount deducted and retained by the delivering carrier is divided between the participating carriers in the same manner and upon the same percentage basis as are observed in dividing freight charges. Under these procedures, there is generally a lag of more than a month after delivery of a shipment before the participating carriers receive their respective proportions of the revenue.

Icing operations, including the furnishing of ice and salt, are performed largely by independent contractors under a contract with either the carlines or directly with the railroad, which names the unit prices for the service involved. The contractor is usually paid about the middle or latter part of the month following the month in which the service is rendered. There are longer lags in instances where any question is raised as to the accuracy of the bill rendered by the contractor and an investigation is required. It is not uncommon for Pacific Fruit Express to withhold payment to its contractors for as much as 2 or 3 months during such investigations.

The time in transit for a transcontinental movement from Lodi, Calif., to New York, for example, is usually about 10 days. The protestants point out that the maximum time elapsing from the time of shipment until the charge is paid at the destination is only about 14 days, and for shorter hauls, such as from Florida to New York, it may be only about 5 or 6 days. They urge that there is no justification for the imposition of any interest charge on working capital after the collection of the refrigeration charge at the destination. Of the numerous carlines and railroads reporting ice costs, only the Fruit Growers Express maintains a definite working capital figure for refrigeration expense in its accounting. The protestants generally contend that the period during which interest is imposed should not exceed one twenty-fourth of a year, which is the same as that used by the Fruit Growers Express in its accounting. The use of a longer period does not appear reasonable. A rate of 4 percent for a 2-week period will be used in the restatement, which is equivalent to adding the sum of $1,145,316 to the property value as a base for a return on working capital.

In computing the transportation cost for ice shipped to platforms, the petitioners used the published tariff charges when the movement was over the lines of a carrier other than the one using the ice, and 10 mills per ton-mile when it moved over the lines of the carrier using the ice, except that for those served by the Fruit Growers Express, a rate of 8.75 mills was used. For switching movements the tariff charge was used.

Some of the protestants maintain that, in many cases, such transportation of ice was in refrigerator cars which would otherwise have

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been returned empty, and that 1 mill per ton-mile would be a proper cost. They refer specifically to 9,836 tons of ice shipped from Chicago and Silvis, Ill., over the lines of the Chicago, Rock Island and Pacific Railroad Company to Dalhart, Tex., a distance of more than 1,000 miles.

The volume of shipped ice transported over the lines of the carrier using it is of appreciable importance at only a few points. Much of the shipped ice moves relatively short distances. In cases where the ice is shipped in refrigerator cars which would otherwise be returned empty, the cars receive the following services: (1) Selection of the car, (2) cutting the car out of the train if it is a return-empty movement, (3) switching the car to the iceplant for side-door loading, (4) holding it for loading of block ice, (5) switching it back to the yard, (6) classifying it as dead freight, (7) switching it to the train for line-haul movement, (8) clerical work to see that the car is properly cut out at destination, (9) classification and separation from other cars, (10) switching out of the train if necessary, (11) holding the car until it is unloaded, (12) switching it back to classification, (13) classification and restoration into a train, and (14) additional clerical accounting; also such items as damage caused by the transportation of block ice in the body of the car. It does not appear that the unit costs used overstate the average cost, and they will be used in the restatement.

The cost of labor includes the labor, on the icing platform, of putting the ice into the cars, but should not include any supervisory expense. Gang foremen who work along with their men properly are includible, but supervisors who do not physically handle the ice should be excluded, because their compensation is included in the item of supervision, a separate expense element. The contract price of ice generally includes delivery into the cars, in which case no separate labor cost is allowable.

An exhaustive investigation of this item, by certain of the protestants, developed numerous instances where supervisory salaries were originally included in the petitioners' computed cost of labor, such as at all Northern Pacific and Pacific Fruit Express icing stations. Pursuant thereto, corrected data were subsequently submitted by the petitioners, which eliminated practically all of the duplications by those carriers, and some of the errors appearing in the reports of other carriers. Other assailed items, which the petitioners considered correct, however, were not changed. For example, these protestants take the position that no separate item of labor for placing ice in cars was allowable at stations where all of the ice was purchased under contract, because it was included in the price of the ice. The petitioners point out that, in many instances, the contract price of the ice covers only delivery to the platform, and that there is, in addition thereto, the

labor cost of placing it in the car. There are several stations, mentioned by these protestants, where items of supervisory expense still remain in the corrected labor cost.

The corrected cost of labor eliminated practically all items of a supervisory nature, but failed to eliminate those at the following stations:

Station	Railroad	Type of work	Amount of expense
Pasco, Wash	Northern Pacific	Supervisory	$828.95
Spokane, Wash	do	do	1,264.35
Kansas City, Mo	Rock Island	do	1,010.25
Dalhart, Tex	do	Inspection	5,743.09
Blue Island, Ill	Indiana Harbor Belt	Supervisory	9,587.38
Total			18,434.02

It is concluded that, after the elimination of the amount shown above, the remaining expense will be approximately correct.

Indirect costs include maintenance of icing facilities, injuries to persons, insurance, telephone, heat, light, power, water, tools and supplies, taxes, and other expenses. Many of these items are relatively small and had minor effect upon the final results. Some carriers averaged their maintenance over a 3-year period. The protestants questioned this procedure as a means of obtaining normal maintenance expenses. This average may produce more normal current maintenance expenses than would be obtained by use of such expenses for a single year. In a study involving a large number of icing stations, the averaging process will have negligible effect upon final results.

Objection is made by the protestants also to the consideration of costs representing the ice department of the Santa Fe, which they consider improper. Expenses of the Santa Fe's ice department are allocated among manufacture, storage, and ice delivery. The icing facilities are operated by that department, whose employees consist of the superintendent and those in his Los Angeles office, plant superintendents, and those in local plant offices, none of whom physically place ice in cars. The petitioners contend that this expense is properly includible in the cost of ice because it relates to the management of ice plants and the physical handling of ice at platforms rather than supervision of refrigeration service. As already noted, the cost of labor includible in the cost of ice may properly include only the salaries of those who do the physical labor, and all others who are in a supervisory capacity are charged to the separate element of supervision. It is concluded that the Santa Fe's ice department expenses are a part of supervision, and the amount of such expenses, namely, $81,938, will be excluded from the restated ice cost.

The amount of income tax is computed to be that which will allow the payment of such income taxes and still leave the carriers with a net return of 6 percent on the investment in icing facilities. In their restatement of costs, the protestants used the same formula, but point out that a reduction in the return on investment and working capital will substantially reduce the amount of income tax. The inclusion of an amount for Federal income tax required for a net return of 4 percent is proper and will be allowed in the restatement.

The table below summarizes, by territorial groups, the cost of ice delivered in bunkers and bodies of cars, restated to reflect the adjustments contemplated by the above conclusions, together with the petitioners' computed costs:

Territory	Cost		Number of tons	Restated cost per ton
	Petitioners'	Restated		
Bunker ice				
Group 1	$7,042,866	$6,385,966	1,388,920	$4.60
Group 2	1,601,172	1,490,200	184,096	8.09
Group 3	3,153,370	2,912,804	378,218	7.70
Group 4	2,555,990	2,545,196	447,633	5.69
Group 5	1,887,356	1,800,480	272,506	6.61
Group 6	1,944,557	1,895,481	289,142	6.56
Group 7	5,145,240	4,964,404	720,262	6.89
Group 8	5,398,509	5,276,992	763,686	6.91
Group 9	2,217,761	2,064,811	285,616	7.23
Group 10	3,142,765	3,055,641	438,977	6.96
Total—Bunker ice	34,059,586	32,391,975		
Body ice				
Total—All groups	1,066,738	1,028,134	126,953	8.10
Total ice	35,126,324	33,420,109		

The present ice costs increased as hereinafter authorized would exceed slightly the foregoing 1951 restated costs in groups 1, 4, and 10, but when effect is given to the subsequent increases in purchased ice, indicated for 1952 and 1953, the resulting costs under the authorized increase would be lower in each group. The record shows that, in terms of the total tonnage reported in 1951, there was an increase since that year of at least 53 cents per ton, or 10.3 percent, in the cost of ice purchased by the petitioners.

Cost of salt.—The cost of supplying salt in bunkers of cars is one of the three elements of expense for which charges are specifically named in section 4 of the protective service tariff, and it is embraced also in the charges provided in section 2 thereof. The carriers show that the cost of salt supplied in connection with the sample shipments in 1951 amounted to $73,529.26, or 4.1 percent of the total of the various expenses incurred in the rendition of refrigeration service. A total of 380,130,055 pounds of salt was supplied that year by the carriers in

rendering refrigeration service, including both section 2 and section 4 shipments, at a total cost of $3,938,375, or an average of $1.04 per 100 pounds. The section 4 tariff charge was 99 cents per 100 pounds, indicating a deficiency, as to shipments subject to that charge, of 5 cents per 100 pounds. Since 1951, the prices paid by the carriers to their contractors for salt have been increased at many stations. It is proposed to increase the present charges for salt to $1.02 per 100 pounds.

At the various icing stations, small quantities of salt, in relation to the amount of ice used, are placed in the bunkers of cars, with many getting no salt at all. The proportion of labor expense and of platform expenses, such as interest on investment, maintenance and taxes, which are allocable to salt, therefore, is small in relation to that apportioned to ice. At some of the stations where substantial amounts of salt were used, an allocation of these expenses was made; but at many other stations it was considered impracticable to make any allocation, and only the purchase price and transportation expense of the salt were reported. No such allocation was made as to at least 34,000,000 pounds of salt used. For this reason the computed cost of salt omits much of the labor expense and most of its share of platform expense resulting in an understatement of costs. These expenses which were not allocated to salt, however, remained in the cost of ice and were included as part of that cost. There is insufficient data of record to permit any computation or estimation of such expense. In the adjustment of costs hereinafter, an amount of $1.04 per 100 pounds is used for the salt factor.

Switching.—The cost of switching refrigerator cars to and from icing facilities is, as hereinbefore indicated, one of the elements of expense incident to the rendering of refrigeration service for which charges were prescribed by us and for which charges are presently provided in sections 2 and 4 of the tariff. The present and proposed charges and their territorial applications are shown in appendix A hereto. The present switching charges of 60, 67, and 106 cents shown therein include increases authorized in Ex Parte Nos. 162 and 166 totaling 32.25 percent over the prescribed charges of 45, 50.5, and 80 cents, respectively. The respective increased charges here proposed are approximately 70, 72, and 72 percent over the present charges.

In their study of switching costs, the carriers concluded that a new and comprehensive study of such costs for the year 1951 would be impracticable and exceedingly burdensome. In lieu of a new study, the prescribed charges of 45, 50.5, and 80 cents were factored up to reflect the relationship ratio of 2.27 to 1 of yard transportation expenses per yard-switching locomotive-mile for the year 1951 to like expenses for 1932. These added expenses produced the respective amounts of

$1.02, $1.15, and $1.82, or the charges proposed. With no indicated intention that, as to the switching charges proposed, the petition should be amended, it was stated on behalf of the petitioners at one of the hearings herein that the index figure of 2.27 was based on a cost per yard locomotive-mile of $2.68 for 1951, erroneously calculated by using the total freight and passenger-yard locomotive-miles instead of only the freight portion which would have produced a figure of 2.43.

The charge of 45 cents prescribed for application at stations on the lines of the Santa Fe, Southern Pacific, Union Pacific, and the Western Pacific in Arizona, California, Nevada, and Oregon was based upon a stipulation by those respondents of the average of the costs of performing the services at those stations. The prescribed charge of 50.5 cents at stations in certain southeastern States was based on 1926 costs, and the prescribed charge of 80 cents for the rest of the country was based on weighted-average costs.

The stated index figures of 2.27 is based on incomplete costs for both years. Those not included are for maintenance and repair, depreciation, taxes, and return on investment of yard locomotives and yard tracks. Whether the inclusion of such expenses would have a material effect upon the index figure is not apparent. The figure is also deficient in that it fails to evaluate the element of technological change that has occurred during the past 20 years, and it does not give effect to the difference in productivity of the yard locomotives as measured by the cars handled per engine-hour. A switching cost per loaded-car comparison would be more suitable than a cost per engine-hour comparison where so much time has elapsed between the studies and the methods of operation may have changed to a considerable degree.

In their computation of costs the petitioners applied the switching-cost factor to all icings regardless of whether any switching was performed, which is in accordance with the Commission's formula. When the switching charges were originally prescribed, however, some of the icing docks were much shorter than the present facilities, and usually required a second spotting of the cars, while some of those presently maintained will accommodate the entire train. In a greater number of instances, therefore, re-icing of entire trains is performed without any switching, particularly at some of the important icing stations in the West.

The meatpackers show that the switching charges per icing, increased as proposed, would exceed, by amounts ranging from 11.5 to 32.5 cents, the prescribed charges plus the cumulative increases authorized for other switching services since June 30, 1946. They, and some of the section 2 shippers, contend that any increase authorized should be limited to such amounts as will reflect the changes in service since 1932, but that in no event should the increased charges exceed the

prescribed charges plus the cumulative increases. The evidence presented is insufficient to permit a determination of accurate costs, prerequisite to the authorization of the specified charges proposed. The prescribed charges plus the cumulative increases will be used in the restatement of these costs.

Supervision.—In discussing the cost of supervision in the second prior proceeding, at page 702 of the first report therein, we observed that, generally, the cost of supervision represented the outlay incurred for salaries, wages and office traveling expenses of officers, their clerks and attendants, general, district, and traveling agents, and icing foremen and inspectors, who devoted all or a part of their time to the handling of refrigerated shipments. We concluded that such outlay was an element of the cost of furnishing refrigeration services, and approved, as factors, amounts per icing, for the supervision of refrigeration services, of 82 cents in the territory west of the Mississippi River, 97 cents in the territory east of the Mississippi River and north of the Ohio River and the southern boundaries of Virginia and West Virginia, and 69 cents in the territory east of the Mississippi River and south of the Ohio River and the southern boundaries of Virginia and West Virginia. Under the authorized increases they have become 108, 129, and 91 cents, repectively.

As to supervision costs, the petitioners' study was confined to those of the Pacific Fruit Express and the Fruit Growers Express, and were computed, generally, in accordance with the method used in the aforementioned proceedings. Supervision costs of the Pacific Fruit Express were considered as representative of those west of the Mississippi River and the costs of Fruit Growers Express as representative of those in the East. The petitioners use average supervision costs per icing of $1.83 in connection with icings performed in the territory west of the Mississippi River, and $1.64 in connection with all icings performed in the territory east thereof instead of amounts for the two eastern territorial divisions described above.

No extra charge is collected for ventilation service; therefore, in theory, the line-haul rate covers the cost of supervision or inspection of a ventilated shipment. Thus, only the excess cost of supervision of a refrigerated over a ventilated shipment would represent the additional cost that should be borne by the refrigeration charge. It should include those costs in general account 111, Other Refrigeration Service, except those occasioned by bunker repairs, diversions, and precooling, and also a part of general expenses. It should include direct icing platform supervision because that is eliminated from the cost of ice, but it should not include supervision directly incurred in ice manufacture, storage, or harvesting since that is included in the cost of ice.

The petitioners allocated general expenses to refrigeration service on basis of the direct supervision costs in each service, whereas the protestants allocated them on a basis of the ratio of general expenses to all expenses, other than general. The protestants in computing the ratio, however, included the substantial expenses in account H, Ice and Salt, but in applying the ratio they omitted these expenses. When their method is properly applied, there is little difference in the results produced by the two methods.

An amount equivalent to supervision of ventilated shipments is deducted from refrigeration supervision costs in order to leave therein only the excess over the costs that would have been incurred if the shipments had moved in ventilation service. In restating supervision expense from the figures of Pacific Fruit Express, the protestants erroneously eliminated the total expenses in subaccounts 401-2, Supervision—Shipments, and 401-4, Inspection—Shipments, for the reason that these expenses for similar services were also included in subaccounts of account 501, Ventilation Service. This procedure excluded the total supervision for refrigeration service in lieu of only omitting an amount equivalent to ventilation supervision cost so that the excess would be included in the costs of refrigeration service.

No adjustment of the petitioners' computations of the cost of supervision appears warranted.

Haulage of ice.—The factor of ice haulage represents the cost of hauling ice in the bunkers of refrigerator cars, including additional train service resulting from the added weight of the ice hauled, and the occasional movement of empty cars out of line for the purpose of icing at origin. The amount of ice hauled in bunkers of cars, as used in the petitioners' computations, was determined by subtracting from the weight of the initial icing one-half the average weight of intermediate icings. An allowance is thus said to be made for normal meltage. The failure to consider the amount of ice remaining in the bunkers of cars at the destination, the protestants argue, results in an overstatement of the average weight of ice hauled. It is their position, apparently, that the rate of meltage between the last icing station and the destination is greater than that assumed in the carriers' computations. Such greater meltage could occur in instances where there is an extremely long haul from the last icing station to the destination, for example, in connection with a shipment moving from California to New York under one of the modified services with one re-icing at Laramie, Wyo.

The rate of ice meltage, which is fastest during the first day or two after the car is loaded, becomes progressively slower as the temperature of the lading is reduced. The rate of meltage, therefore, would become slower as the car approaches the destination. There are several

factors which affect the rate of ice meltage, such as the efficiency of the particular refrigerator car used, the season of movement, the outside temperature encountered, which may vary widely over different routes, the temperature of the lading, and the preicing of the car. In view of these circumstances, it clearly is not feasible to devise a method under which there would be an accurate determination of the average weight of the ice hauled in each instance. As to about three-fourths of the traffic there may be some understatements of the weight of ice hauled, particularly when standard refrigeration is used with re-icing at all regular icing stations, but with the probability of the overstatements and understatements being offset by each other, it does not appear that the overall results in the petitioners' computations are inaccurate to any important extent when the method is properly applied. It is indicated however, that there were some instances of improper application of the method in the computations, which resulted in the use of an inflated weight factor, such as those where the combined weights of the ice initially placed in the bunkers and that added in the retouching, before the car was loaded, were used as the weight of the initial ice. Thus, a weight in excess of the capacity of the bunkers was used, resulting in an overstatement of the basic weight factor.

The cost per ton-mile of hauling the ice is computed on the premise that bunker ice should bear only its proportionate part of those expenses chargeable to the movement of trains over the line that are increased by weight, and that it should not be charged with a share of any expenses that are not increased by weight or that are due to obsolescence or action of the elements and accrue whether or not any trains are run. The computed additional cost per ton-mile incidental to the haulage of ice in bunkers of refrigerator cars is 1.15816 mills for 1951 and 1.13852 mills for 1952. In computing the bare expense caused by the weight of ice in the bunkers of cars, the petitioners followed the Commission's formula in the second prior proceeding, with a few exceptions. These data were obtained from the annual reports of the 14 selected railroads [4] used in our computations in the cited proceeding.

Appendix C hereto shows the computations and the method observed by the carriers. Similar computations for the same years of 1951

[4] The Atchison, Topeka and Santa Fe Railway Company, the Chicago and North Western Railway Company, The New York, New Haven and Hartford Railroad Company, the Wabash Railroad Company, The Baltimore and Ohio Railroad Company, the Erie Railroad Company, The Pennsylvania Railroad Company, The Western Pacific Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), the Southern Pacific Company, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The New York Central Railroad Company, and the Union Pacific Railroad Company. These carriers and those listed in the footnote below are referred to herein by their short titles.

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and 1952 were also made for 20 of the principal carriers [5] of perishable shipments, indicated as 1.13953 and 1.13131 mills. In those computations an amount was added for payroll taxes to cover railroad retirement costs, which was not included as an expense item in the Commission's formula, it having originated subsequent thereto.

One-third of the maintenance-of-way expenses are assumed to vary with use. From this is deducted the terminal portion which is covered by the line-haul charge and by the factor of switching per icing. The remainder is the portion of maintenance of way affected by the weight of ice.

The maintenance-of-way equipment expenses remaining after deducting the portion assignable to terminal and to freight-train cars is considered 80 percent variable with weight including the weight of the ice. In the transportation group of accounts, only superintendance less the terminal portion, train fuel and power, water, lubricants, and other supplies for train locomotives were included as varying with the weight of the ice carried. A payroll tax of 6.5 percent of 60 percent of the sum of the above costs is added. The sum of these costs was divided by the gross-ton miles including locomotives, tenders, and cabooses, but excluding nonrevenue ton-miles and their share of tare weight ton-miles to produce a cost in mills per ton-mile.

The inclusion of all of the cost of superintendance related to line haul, except the transportation wages and salaries, does not appear justified because supervision is closely related to the personnel supervised as reflected in the wage and salary accounts. The payroll tax is applied to 60 percent of the expense included in this formula. It does not appear that so large a portion of this group of expenses is properly chargeable to wages and salaries. A rough test applied to expenses on the Santa Fe indicates that not more than 47.5 percent is assignable to payroll.

In the prior proceedings, the computed cost per ton-mile was increased by 49.265 percent to compensate for the additional train service caused by the weight of ice and extra hauls incidental to icing at originating points. These factors could not be measured but had to be assumed. To compensate for these expenses, the increase in the freight portion of railway operating expense per ton-mile of ice hauled in refrigeration service, determined to be 0.502463 mill, was increased to 0.75 mill, amounting to an increase of 49.265 percent in the Commission's formula.

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[5] Includes the railroads named in the preceding footnote, except the Western Pacific, and includes also the Chicago, Burlington & Quincy Railroad Company, The Chesapeake and Ohio Railway Company (for 1951 only), the Great Northern Railway Company (for 1952 only), the Illinois Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railroad Company, and the Southern Railway Company.

The use of diesel power has resulted in substantial increases in the per train tonnage hauled. In some instances, the increases amount to as much as 40 percent over the tonnage hauled when the use of the aforementioned 49.265-percent increase was allowed. The assumption that the weight of ice in the bunkers of refrigerator cars might cause additional train service, therefore, was based on operating conditions materially different from those now prevailing. With the greatly increased tonnage that can now be handled in a train, and the improved operating efficiencies, the probability that additional train service may be required occasionally by the weight of the ice hauled has lessened substantially. The method of computing the cost of ice haulage, however, omits certain items of expense, such as the wages of traincrews, which would be incurred if additional train service were required as a result of the weight of ice in the trains handling the perishable traffic. The omission of these items acts as a substantial offset to the changes in the method of operation. The difference between the inclusion of these expenses and the reduction due to the changes in operation must be regarded as of a minor nature. No adjustment in the computed cost of ice haulage appears warranted.

Damage to bunkers and bodies of refrigerator cars.—To compensate for the expense of repairing damages found to result from bunker and body icing of refrigerator cars, we concluded, in the second prior proceeding, that a charge of $5 per car per trip for bunker repairs and a like charge for repairs to bodies of cars would be reasonable. Under the authorized increases, the factors became $6.61. In the initiation of their study in this proceeding, the petitioners concluded that a comprehensive study, required to determine the present costs of such repairs, would be impracticable. They seek no increase in the present factor of $6.61, which was used in computing the costs shown in their study. They, nevertheless, presented the results of a record maintained by the Fruit Growers Express of the cost of repairing refrigerating devices of its cars during the first half of 1953, which averaged $8.45 per car per trip.

Station and auditors accounting cost.—The inclusion of a charge of 35 cents per car per trip to cover the cost of accounting work in connection with icing service on refrigerated shipments, proposed by the respondents in the second prior proceeding, and unopposed by the shippers therein, was approved by us. Under the authorized increases it has become 46 cents. An increased factor of 96 cents per car per trip is used by the petitioners in computing the present costs shown in their study. It was arrived at by adjusting the original factor of 35 cents to reflect the increased accounting labor expense prevailing in 1951, by the use of a percentage relation of the straight time hourly pay of class B and class C railroad clerks in December

1951, to that existing in December 1930. The respective rates of pay were $1.792 and 64.2 cents, which produced a relation of 279 percent. The increased charge proposed for this element of expense substantially exceeds the total of 67.7 cents that would have resulted by applying to the prescribed charge of 35 cents the cumulative increases authorized for freight rates generally since June 30, 1946, which some of the protestants contend should be the maximum.

The protestants argue that the method of adjustment employed by the carriers is defective, in that it does not give effect to any increased efficiency, changed method, greater mechanization, or different requirements of service taking place during the 21-year period involved. In order to accord full weight to an adjustment based solely on salary comparisons, it requires an assumption that the clerk's productive efficiency remained constant throughout the entire period. Evidence of record indicates that, during that period, the railroads have made material changes and improvements in the operation of their offices, which has resulted in substantially greater efficiencies in the handling of clerical work, but it also appears that the complexity of the tariff provisions for the various refrigeration services has increased materially since the disposition of the prior proceedings, necessitating an increase in the clerical force having the responsibility of determining applicable charges.

Comparisons of the relation of the average clerk's total compensation with traffic units and operating revenue, presented by the protestants, indicate that the clerk's compensation per traffic unit rose 16 percent, and compensation of $1 of revenue decreased 3 percent, during the period from 1930 to 1951. These comparisons ignore the important changes in the nature of the traffic occurring during that period, which have resulted in a decrease in the relative number of less-than-carload shipments to carload shipments, and an increase in the lengths of haul per shipment. It appears that clerical cost varies more closely in proportion to changes in the number of shipments than with other measurements of service performed.

The evidence presented by the petitioners fails to show the 1951 cost of this element in the refrigeration charges. The prescribed charge itself, which merely has been factored up by the petitioners in the manner above described, has never been established as an actual cost. The proposed charge would disrupt the long existing relations resulting from the several prescribed component elements of the refrigeration charges. There is insufficient cost data to justify any charge for this element of expense in excess of the prescribed charge plus the cumulative increases authorized for general application on other traffic.

Hazard.—In the second prior proceeding it was determined that the aggregate costs per car per trip incurred by the respondents therein as the result of so-called hazard which were properly chargeable against refrigeration service on shipments under section 2 from Arizona and California, were as follows:

	Apples and citrus fruits	Deciduous fruits and melons	Vegetables
	Cents	*Cents*	*Cents*
Loss and damage claim payments	5	10	20
Cost of inspection at destination	15	15	15
Uncollectible refrigeration charges	1	1	1
Total cost of hazard per car per trip	21	26	36

The foregoing amounts were factors in the charges published pursuant to the findings in that proceeding. As a result of authorized increases, hereinbefore referred to, they became 28, 35, and 47 cents, respectively. The petitioners' computed costs as to hazard, shown in their study in this proceeding, are based on these amounts. They introduced no evidence in support of any further increases in such factors. Evidence presented by certain shippers as to claims paid for loss and damage affords no basis for any modification of these factors.

Precooling.—The practice of precooling refrigerator cars and the ladings was developed about 1930, and as to California shipments it became general in 1948. It is performed largely by the shippers. In California, precooling plants are operated at Colton and Los Angeles by the Pacific Fruit Express and at San Bernardino by the Santa Fe. The precooling operations at these points consist of placing cars loaded with fruit or vegetables on tracks adjacent to the precooling facility and forcing cold air through the lading for periods ranging from 4 to 12 hours, usually 8 hours. This service is performed in connection with shipments under rule 245, as well as those moving under standard refrigeration. In their precooling operations, the shippers also cool the lading by circulating cold air through the car, which is usually accomplished by the use of portable fans blowing air over ice into the car.

In the second prior proceeding, we found reasonable for the future a charge of $6 per car to cover the cost of precooling at Colton and San Bernardino when performed by a carrier, the Los Angeles plant not having then been put into operation. It is proposed to increase the present charge of $7.94 to $10.23, or by 30 percent, the same as proposed for other section 2 charges. The cost in 1951 of rendering precooling service at Colton, San Bernardino, and Los Angeles, as originally

developed by the petitioners and used in the computations, were $15.15, $9.33, and $11.77, respectively. At San Bernardino, for example, they were based upon an average ice equivalent of 3.08 tons per car at $3.03 per ton, the cost of manufacturing ice at that point. The adjustments in the cost of ice as restated herein have been applied to the precooling factor, resulting in a precooling cost per car of $13.33 at Colton, $7.54 at San Bernardino, and $10.40 at Los Angeles.

The protestants contend that, in addition to effecting a better arrival condition of the lading, precooling results in substantial economy in the use of bunker ice by retarding meltage. More than 98 percent of the fresh deciduous tree fruits and grapes that move to interstate markets by rail are precooled by the shipper either before or after loading. In recent years his average cost per car for precooling exceeded $40. At the time of precooling, a shipper may also fill up the depleted bunker at its own expense, and this is done to a large extent. If this were not done the ice would be replenished at the first icing station by the railroad at the shipper's expense, as provided in rule 246 of the tariff. The western shippers state that precooling and good refrigeration practices are particularly necessary in connection with their shipments, in order to enable them to compete in the eastern markets with shippers more advantageously situated in relation to those markets.

It is urged by the protestants generally that precooling is beneficial to the carriers as well as to the shippers. Prior to its development, about 50 percent of loss and damage claims were based on condition. One shipper shows, for example, that its claims do not now exceed 10 a year, as compared with approximately 1,000 to 1,500 a year prior to the use of precooling.

The vacuum process of precooling commodities prior to loading was not developed until 1952. Under this process the commodities are placed in a large metal tube, after which doors at each end are closed and a vacuum is drawn, reducing the temperature of the commodity to approximately 33 degrees or lower if desired. Lettuce, strawberries, celery, artichokes, spinach, sweet corn, cabbage, and endive can be vacuum cooled satisfactorily. The amount of bunker ice used for commodities that are vacuum precooled is substantially less than that for other commodities not vacuum precooled, but the rate of ice meltage in connection with shipments thus precooled is slightly higher than that for those accorded top or body icing.

The vacuum-precooling plants are centrally located in the heavier shipping areas, and have rail track facilities sufficient to accommodate from 16 to 30 or more cars, as compared with the widely scattered rail sidings and packing sheds formerly used, which accommodated only a few cars. This greater concentration of loading has resulted in

reducing the amount of switching per car previously required. All the vegetable-growing areas of Arizona and California, where there is substantial production of lettuce and the aforementioned commodities, are now served by vacuum-cooling facilities. Similar facilities are being constructed to serve the shippers in the Rio Grande Valley of Texas.

The table below is a restatement of the results of the petitioners' cost date, adjusted as hereinbefore indicated, as to the sample section 2 shipments.

Elements	Cost	Adjustment	Adjusted cost
Ice	$1,124,301	$55,091	$1,069,210
Salt	73,529		73,529
Switching	135,449	19,911	115,538
Supervision	159,746		159,746
Ice haulage	163,501		163,501
Bunker damage	92,368		92,368
Accounting	13,414	3,971	9,443
Hazard	5,170		5,170
Precooling	9,668	1,368	8,300
Total	1,777,146	80,341	1,696,805
Total revenues			1,368,968
Total loss			327,837
Percent of loss			23.9

Types of refrigerator cars and their utility.—In October 1954, the railroads had in service more than 120,000 refrigerator cars, refrigerated by means of ice and salt, and approximately 600 refrigerated mechanically, with about 200 more of the latter type on order. The mechanically refrigerated type of car was put into service originally in February 1949. The slow augmentation of these cars has been due to the necessarily long period of experimentation and the limited demand for them.

The charge for a shipment transported in a mechanically refrigerated car generally is the same as that for standard refrigeration, except that for frozen commodities it is 150 percent of that for standard refrigeration, which is substantially higher than any of the charges provided for the various modified services. The use of mechanical cars has been limited to shipments of frozen foods and frozen fruit-juice concentrates. From Florida, during the 1952–53 season, approximately 48 percent of the total volume of frozen-fruit concentrates by rail moved in mechanically refrigerated cars. The proportion during the 1953–54 season through April 17, 1954, increased to 65 percent, and will increase further when more cars become available.

It is indicated that a reasonably stable temperature of zero or lower is required to insure adequate protection of frozen concentrates in transit, and for that reason the mechanical car is used when available.

Mechanically refrigerated trucks also provide satisfactory temperatures. The minimum temperature attainable under ice and salt (30 percent salt) refrigeration is about 15° Fahrenheit. The refrigeration charge is increased 50 percent when 30 percent salt is used, or to the same level as applies on shipments in the mechanical cars. The total transportation charge by rail, including the increase proposed for standard refrigeration, would exceed the total transportation charge for frozen foods by truck from Winter Haven, Fla., to numerous important markets by amounts per 100 pounds ranging from 6 cents at Detroit, Mich., to 50 cents at Pittsburgh, Pa. The charge by truck generally covers both line-haul and refrigeration services. A substantial proportion of this traffic is moved by truck. For example, during the period from September 1, 1952, through August 31, 1953, approximately 39 percent of all the shipments of frozen citrus concentrates from Florida moved by truck. The number of mechanically refrigerated trucks in service is being increased substantially.

It is proposed to increase the section 2 charges applicable to shipments transported in mechanical refrigerator cars by 30 percent, or the same as is proposed for those transported in the ice-refrigerated cars. Although the cost of the mechanical cars is said to be about double that of the ice refrigerator cars, there is no evidence of record concerning the cost of rendering mechanical refrigeration service. Without such information, the lawfulness of the increase proposed cannot be determined.

Changes in packaging.—The packaging of certain vegetables is undergoing radical changes because of consumers' demands and the increasing costs of wooden crates. During and since 1952, in Arizona and California, and a year later in Texas, shippers have been changing to the use of fiberboard or cardboard cartons for packing lettuce and polyethylene bags for carrots. The principal Arizona and California producers of lettuce and carrots estimate that the use of the described packaging will expand to about 90 and 50 percent, respectively, of the total shipments of those commodities in 1954. It was reported in The Marketing News that, up to May 7, 1954, 91 percent of the lettuce shipped from Arizona was packed in cartons and moved under standard, full, or half-stage refrigeration. The percentage of such shipments from the Imperial Valley in California, up to April 2, 1954, was 83.33, and from the Salinas-Watsonville area in California up to September 24, 1954, it was 71. Changes in packaging are being extended also to other producing areas and to additional commodities.

The inability of the various types of fiberboard, cardboard, or plastic packages developed, thus far, to withstand the moisture from top or body icing necessitates the elimination of such refrigeration when those types of packages are used. In those instances the lading is

precooled by the shipper, in specially designed cooling plants, and generally is shipped under standard refrigeration. Many of the precooling plants use the vacuum-cooling process, hereinbefore discussed. Experiments are under way with a view to developing a container that will withstand the moisture from ice meltage.

The expanding use of the described packaging requires greater use of standard refrigeration. The protestants point out that the greater charge for such refrigeration results in a substantial increase in the per car revenue, that the required use of ice in greater volume results in a lower unit cost of providing refrigeration service, and that the elimination of top icing avoids damage to the floors and walls of cars ordinarily caused by meltage and shifting of ice. Another indicated benefit, accruing to the carriers as well as to the shippers, from the use of such packaging is its aid in maintaining the fresh condition of the vegetables and thus tending to stimulate the volume of sales and in turn the volume of movement and to minimize the damage claims.

Dieselization of motive power.—Dieselization of railroad motive power, in progress for more than a decade, has been completed by many of the carriers, and is in varying stages of completion on other railroads. Of the 41,604 units of motive power maintained by all the railroads of the country in 1951, 19,014 were diesel powered (including diesel-electric), or approximately 45 percent of the total. Their use over the routes over which the great bulk of the perishable traffic moves is almost, if not already, complete. The use of diesel power, improved rolling stock, and other operating efficiencies resulting in higher train speeds, have permitted substantial reductions in the time in transit of perishable shipments to the primary markets, and increases in the per train tonnage of as much as 40 percent in some instances.

Some of these improvements have been effected since 1951. For example, in 1953 the carriers operated an expedited service from origins in Florida to New York, N. Y., which permitted third-day delivery, and from California to Chicago, Ill., they established a schedule of 62 hours. Prior to the use of diesel power the respective normal schedules were about 5 and 10 days. At present, for normal service, guaranteed schedules of 3 and 6 days are maintained; during 1951, the guaranteed schedule from California to Chicago was 7 days. The faster schedules permit the elimination of some icing of shipments, as well as reductions in the consumption of ice en route. The regular icing stations on several of the more important routes from the West, aggregating 276 on August 21, 1948, had been reduced to 268 in August 1951, and to 253 in March 1954.

As to the operating economy of diesel-powered units, it is shown that their national average cost per locomotive-hour in yard service during 1948 was $5.8783, as compared with $10.5054 for steam locomotives, or slightly more than half of the latter.

Probable effect of increased charges upon traffic and producers.— Much of the evidence presented by the protestants relates to various economic circumstances affecting the producers and shippers of perishable commodities and the movement thereof, such as crop failures, spiraling costs of production and marketing of their products, unprofitable market prices received in many instances, constantly shrinking per capita consumption of certain commodities, and the increasing use of truck transportation.

In December 1953, the index of prices received for vegetable crops in Florida, constructed by the United States Department of Agriculture, was 223 as compared to an index of 284, the index of prices paid by the farmers for production items, interest, taxes, and wage rates. The percentage ratio of prices received to those paid was 79 for December 1953. In March 1953, it was 78 and in May it was 71. The prices received by the Florida farmers for vegetable crops have been below parity since 1948. Costs of marketing fresh vegetables also have been increasing, and taking a greater portion of the retail dollar than the farmer receives. During the past 4 years he has received from 37 to 46 percent of the vegetable retail dollar. In 1953 his share dropped from 42 percent in the first quarter to 33 percent in the fourth quarter. It is stated that many of the growers are losing money and that the proportion of those showing a positive net return and an average net return per acre have been decreasing since the 1948–49 season.

During the 1948–49 season, when prices received and paid were close to parity, more than half of the snap-bean growers, two-thirds of the tomato growers, and nearly all of the celery growers, contacted in a survey, reported profits ranging from $87 per acre for beans to $647 per acre for celery. In the 1951–52 season only 28 of the 72 snap-bean growers, 15 of the 57 celery growers, and 59 of the 112 tomato growers reported profits. The average per acre profit was smaller and the losses were larger for celery and tomato gowers. Substantially similar results were reported for the 1952–53 season. With the prevailing below-parity prices of fresh vegetables, the protestants urge that the Florida growers are in a relatively poor position to absorb any further increase in the cost of marketing their products.

The "on-tree" values per box in purchasing power of Florida oranges and grapefruit declined from $1.14 and $0.54, respectively, in the 1930–31 season to 40 and 25 cents in February 1954. The average price per box f. o. b. at point of origin of all Florida citrus fruit, packed, in-

creased from $1.65 in the 1910–11 season to a peak of $3.90 in 1927–28 and declined to $2.81 in 1952–53, with intermediate fluctuations ranging from a low of $1.51 in 1940–41 to a high of $3.48 in 1944–45. The disposition of Florida oranges amounted to 49,789,104 boxes in 1945–46 and 72,200,000 in 1952–53, or an increase of 23,010,896 boxes, but the disposition to commercial canneries included therein increased 26,647,524, which more than offset the increase in the total during that period. The production of citrus fruit in Florida has been in a pronounced upward trend for a number of years contrary to the trend of the production thereof in Arizona and California, which has been downward, as hereinafter indicated. Despite this increase in the movement from Florida, the railroads' proportion has declined substantially in recent years. An important factor influencing the diversion of this traffic from the rails is the accessibility by truck of the major markets, as well as other factors enumerated below.

Florida shippers submitted data showing the volume of movement of fruits and vegetables from Florida by rail, boat, and truck during the seasons 1931–32 through 1952–53. Of the total volume of citrus fruit shipped from Florida during 1931–32, aggregating 56,663 carloads, the percentages of the total transported by rail, boat, and truck were 79.4, 7.5, and 13.1, respectively. The respective percentages of 34,192 carloads of vegetables shipped during that period were 95.3, 00, and 4.7. During the 1952–53 season the respective percentages of 80,181 carloads of citrus fruit were 50.6, 0.3, and 49.1, and of 99,711 carloads of vegetables they were 45.9, 00, and 54.1. The movement by truck increased sharply during the last six seasons. The bulk of the truck movement is by exempt and private carriers. Some of the large shippers prefer rail transportation for their traffic and have resisted the use of trucks, but are being forced to use them to a greater extent for various reasons such as economy, competition with other shippers, and consumer demands. The buyers frequently send their own trucks for their requirements. Witnesses for the numerous large shippers represented testified, without exception, that any further increase in the cost of rail transportation unquestionably would cause an acceleration of the present trend toward the use of truck transportation.

Similar to the described situation in Florida, the Texas growers of fruits and vegetables are adversely affected by rising costs of production and the declining prices received for their products in recent years, and, in addition thereto, they are subjected to the disadvantage of crop failures caused by frost or drought and the greater distance to the primary markets, with the resulting greater transportation expense. The effect thereof is indicated in the volume of carload shipments of fruits and vegetables from Texas, which declined steadily in the period 1948 through 1952. The respective annual totals were 76,807, 52,078,

44,974, 26,707, and 38,444. Part of the decline in 1951 was due to the cold weather in the 1950–51 season (a freeze on January 29, 1951), which damaged the vegetable crop and destroyed most of the citrus fruit trees.

The highest prices received throughout the shipping season generally prevail for a short period at the beginning of the early-crop season in December and the first half of January. As to the prices received for representative commodities during the seasons 1951–52 through 1953–54, data submitted on behalf of the Texas shippers show that the prices received in 1953–54 were as much as 75 percent lower than those received in 1951–52. For example, the price of cabbage, f. o. b. Rio Grande Valley, ranged from $4.50 to $4.75 for 50-pound bags on December 31, 1951, $1.15 to $1.35 on November 27, 1953, and 70 to 85 cents on December 31, 1953. It is stated that the prices received by the farmers for their vegetables, in many instances, are not covering the cost of production. The production of cabbage runs from 3 to 6 tons an acre, and has sold as low as $4 or $5 a ton in the field. There were instances where shippers of potatoes from the Hereford, Tex., district received as little as $17 for a carload of potatoes in 1953.

The Texas shippers assert that they cannot absorb any further increase in the cost of marketing their products, and that if the proposed increase should be established they will be forced to seek more economical transportation or discontinue shipments. With that increase, the total rail transportation cost would generally exceed the present cost by truck and, like the Florida shippers, they claim that it would greatly accelerate the trend toward the use of trucks. The movement of their citrus fruit by truck during the respective seasons increased from 13.95 percent of the total volume, equivalent to 32,409 carloads, in 1944–45, to 55.16 percent in 1948–49, and 90.71 percent in 1953–54. Statistics on the total movement of vegetables by truck were not compiled prior to the 1951–52 season. Of the total volume of shipments of vegetables from Texas, in the 1951–52, 1952–53, and 1953–54 seasons, equivalent in carloads to 12,320, 15,950, and 20,922, respectively, the respective percentages thereof transported by truck were 17.79, 22.62, and 27.39.

The growers of fruits and vegetables in Arizona and California depend upon the primary markets in the East for distribution of the great bulk of their products. They, too, are seriously affected by the rising costs of production and the declining prices received for their products, and because of the greater distances to the principal markets, they are subject to the maximum disadvantage as to transportation costs. In order to compete with producers closer to the markets, they are constantly striving to improve the arrival quality of their products.

through the production and selection of the highest quality products for shipment and the use of adequate refrigeration service. The production of fruits and vegetables is the most important industry in those States. In 1953, the total number of shipments of vegetables, deciduous-tree fruits and grapes, and citrus fruits from those States amounted to approximately 168,000, 40,000, and 57,000 carloads, respectively.

Because of heavy losses sustained by Arizona and California growers of vegetables and melons, shipments of those products in 1954, it was estimated, would be substantially less than they were in 1953. During the 18 months just prior to March 1954, the average prices received by the growers were the lowest since 1937. The producers found it necessary to reduce the acreage of some of those crops very materially during that period. For example the acreage in carrots in the desert districts, Imperial Valley, and Arizona is down almost 50 percent, and some of that formerly used for growing lettuce has been planted in sugar beets and some is being used as pastures. A great many producers have been forced out of business.

Illustrative of the price situation, it appears that, during the fiscal year ended July 31, 1953, Harden Farms, a large producer of vegetables in California, sustained losses averaging more than $100 of each carload of vegetables shipped. Taking lettuce as an example, this producer states that its margin of profit in the popular selling price of 19 cents a head, is only 0.6 cent after the expense of growing and marketing the commodity, without any allowance for the cost of insurance, or any return on the investment or working capital. It estimates that the proposed increase in refrigeration charges would consume one-third of that margin. A higher selling price, it is claimed, would result in consumer resistance and a smaller volume of movement. The Arizona and California vegetable growers assert that it has become extremely difficult for them to compete in the eastern markets, and that they are steadily losing ground to competitors more advantageously situated, who generally ship by truck. Based on their 1953 volume of shipments, and using the refrgeration charges applicable to Detroit for the various services as an average, these shippers of fresh vegetables and melons estimate that the additional burden that would be imposed upon their shipments by the increase proposed would aggregate $3,584,812.

During the 1953–54 season there was some further increase in labor costs, with no reduction in the cost of materials used by the producers. For instance, some time prior to World War II the producers could be certain of breaking even or realizing a small profit on cantaloups sold at $1.25 a standard crate. At the present time, they must receive $5 a crate to break even. They claim that if the present structure of

prices continues for any appreciable length of time, the tonnage will diminish to such an extent that it will be limited to quantities sufficient to maintain them only as so-called luxury commodities. Any increase in the cost of transportation, they assert, would force further diversion to the trucks, or discontinuance of shipments entirely. Shipments of vegetables and melons by truck, in carlot equivalent from Arizona and California, increased from 7,590 in 1946 to 40,945 in 1953.

More than 73 percent of the fresh deciduous tree fruits, grapes, and berries that move by rail to interstate markets, move to the heavy consuming areas east of the Mississippi River. Over 61 percent move to markets east of Chicago, and more than 20 percent move to points in the greater New York area alone. The annual rail movement of these commodities, in carloads, from California increased from 89,178 in 1923 to 117,723 in 1928, declining steadily thereafter to 41,748 in 1944, increasing to 52,102 in 1947, and declining subsequently to 40,152 in 1953, or about 65 percent from the 1928 volume. During that period the population of the United States increased approximately 43 percent. This decline in movement by rail is attributed not only to diversion to trucks, but principally to declining per capita consumption, competition of producers closer to the principal markets, and to increased costs of marketing these products. It appears that where there has been a constant increase in the number of carloads shipped each year, as occurred in 1951 and 1952 over 1950, there has been a steady decline in the percentage of distribution of shipments in groups A and B involving the longest hauls and the highest transportation costs. New York is embraced in group A.

Because trees and vines are permanently planted to produce perennial horticultural crops, which take several years to bring into bearing at a relatively high cost of original capital investment, an adjustment in production cannot be accomplished without severe capital losses to the producer. Owing to the extreme perishability of the commodities and the long haul to the principal consuming markets, a substantial proportion of these crops move to markets on consignment for account of the shipper, and for that reason he is frequently forced to accept distress prices for them. The volume of movement by truck is increasing substantially, having increased from 1,431 in 1946 to 6,966 carlot equivalents in 1953. Movements by truck to destinations east of Chicago are small, but the length of haul is becoming longer each year.

The quantities of citrus fruit grown usually exceed the demands, giving rise to marketing problems. The citrus industry in Arizona and California is being operated under a marketing agreement program which has been in operation during most of the time since it was instituted under the Agricultural Act of 1933. For the 7 seasons

1946–47 through 1952–53 the percentage ratios of the "on-tree" prices to the parity prices, fixed by the United States Department of Agriculture, were 47, 42, 54, 51, 54, 57, and 39. Data were submitted on behalf of the citrus fruit growers, showing the "on-tree" farm value per acre of their products before depreciation of the t ees, but after deduction of the cultural cost thereof and an allowance for interest on the investment. On navel and miscellaneous oranges, for example, the income account for the 7 seasons showed losses per acre to the grower of $6, $129, $154, $49, $5, $24, and $67, respectively. On Valencia oranges, the respective losses were $173, $147, $216, $121, $88, $126, and $153. On lemons, the results during the respective seasons were losses of $91, $138, $46, and $46, and profits of $10, $120, and $138.

The canning of single strength orange juice and blended orange-grapefruit juice began about 1935 and became a part of the utilization pattern in the citrus-fruit industry. In 1947–48, a third product, frozen concentrated orange juice, was developed, and its production has increased very rapidly in the past 6 years. It takes substantial quantities of oranges from the available supplies, particularly, in Florida. The utilization of citrus fruits in the production of juices is much greater in Florida than it is in Arizona and California. For example, in 1952–53 only about 38 percent of Florida oranges and tangerines were shipped in the fresh state as compared with a volume from Arizona and California amounting to about 68 percent of the Valencia oranges and 88 percent of other kinds including navel oranges. The shipping weights of citrus-fruit products from 2,000 pounds of fresh oranges, for example, would amount to 1,056 pounds of natural-strength orange juice, or 288 pounds of frozen concentrate, or 400 pounds of bottlers' concentrated juice.

The movement of citrus fruit by truck from California, in carlot equivalents, increased from 7,137 in 1946 to 12,777 in 1953, or approximately 78 percent. A preponderance of the total movement of citrus fruits is to destinations east of the Mississippi River. The movement by truck, in carlot equivalents, of vegetables, citrus fruits, and melons from California increased from approximately 8,500 in 1946 to 60,600 in 1953.

The shippers of fruits and vegetables from Oregon and Washington also assert that any further increase in the cost of transportation of their products will cause an acceleration of the present trend toward the use of truck transportation. Illustrative of that trend, they show that 890 carlot equivalents, or 3.5 percent of the total volume of 26,556, in the 1942–43 season were moved by truck, and that the proportion by truck increased steadily thereafter to 5,327, or 28.5 percent of the total of 23,874 in 1953–54 (through March 20, 1954).

With the exception of cantaloups and watermelons, and frozen fruits, berries, and vegetables, the movement of fresh fruits and vegetables by rail has been in a downward trend since 1935. In 1951, the combined total of all section 2 shipments by rail was 274,405 carloads less than the number transported in 1946.

Approximately 2,000 carloads of frozen fish are shipped from the Northwest annually. Out of approximately 5,900,000 pounds shipped to Chicago in 1953, about 5,686,000 pounds moved by rail. During that year 53,000,000 pounds from other sections of the country moved by truck to the Chicago market. To New York in the same year, the movement from the Northwest was entirely by rail, while about 134,000,000 pounds moved by truck from other origins. These data, it is asserted, support the contention that insofar as fish is concerned, the greater burden of the increase proposed would be upon the Northwest shipper. In support of claimed economic ills of the domestic fish industry, the Northwest fish shippers point out that in 1953, 45.4 percent of the fillet fish consumed in the United States was imported, as compared with only 8.7 percent in 1939.

The movement of fresh meats and packinghouse products, being regular and in substantial volume, constitutes a very important segment of traffic, for which there is keen competition between the different modes of transportation. They are produced in almost every State of the Union, but the predominant movement is from origins in Central Freight Association and western trunkline territories. Data presented by the meatpackers show the total annual volume of movement of these commodities for the years 1940 through 1953. In 1940 the railroads received 59.9 percent of that traffic. Their proportion increased in each of the years during the war to a maximum of 80 percent reached in 1944. Thereafter, the railroads' proportion of the traffic declined steadily to 48.1 percent in 1953.

General discussion and conclusions.—As noted in prior proceedings, the carriers were required to establish and maintain charges for refrigeration service separate from the line-haul rates or charges on the lading thus serviced, and the charges prescribed for this service were designed to cover the cost thereof, plus a reasonable return on the investment in property devoted to the performance of such service. These charges, together with those voluntarily established subsequently for additional modified services, include only the respective increases of 15 and 15 percent authorized in Ex Parte Nos. 162 and 166, the further increases sought in Ex Parte Nos. 168 and 175 having been denied for lack of sufficient proof of any need therefor. In support of their petition in the instant proceeding, the carriers have presented

cost data, an analysis of which indicates a substantial deficit in the total of the revenue from refrigeration services as herein found.

As indicated by the foregoing discussion, there are complex factors in the numerous elements of expense incurred in the performance of refrigeration service, which tend to render an accurate determination difficult and susceptible of various analyses and conclusions, depending in part upon what may be considered sound formulas. Upon due consideration of inaccuracies and questionable items, and with appropriate modifications, as herein indicated, a finding is warranted that the petitioners are sustaining a total deficit exceeding 23 percent of the aggregate revenue accruing from the rendition of their refrigeration services.

The protestants take the position generally that, upon the evidence presented, there is no justification for any increase in charges for these services; that the perishable traffic affected cannot bear any additional burden; and that an increase would affect adversely both the carriers and the shippers.

The record is replete with evidence indicating a steady increase in diversions of the affected traffic from the railroads to trucks in recent years. It is also shown that in many instances, because of depressed market prices, the transportation charges were too high to warrant consignments, and substantial reductions in the volume of movement resulted. Although heretofore there has been applied the principle that the separately maintained refrigeration charges should cover the total cost of performing that service, the intense competition that has developed in the movement of this traffic, together with the unstable economic conditions in the industry, require consideration of the total transportation cost to the shipper and the effect upon the movement of the traffic in determining whether increases here proposed are just and reasonable.

The petitioners' study is not sufficiently comprehensive, and does not contain the necessary degree of exactness, to constitute sound support for the disturbances of the prescribed basic relations that would result from their proposal. The evidence is convincing that an increase, as proposed in the total cost of transportation to the shipper of commodities under refrigeration, would cause an acceleration of diversions of that traffic from the rails, or a loss of traffic otherwise, to such an extent as to result in a substantial reduction in revenue. It appears that a substantial amount of the affected traffic could not bear the increased cost of transportation which would result from general increases in charges for refrigeration services sufficient to cover the total costs thereof.

We find that an increase in the specified refrigeration charges in excess of 15 percent is not justified in the indicated circumstances. Based on the volume of refrigeration service rendered in 1951, an increase of 15 percent would yield additional annual revenue approximating $6,000,000. After the establishment of the increases herein authorized, the petitioners should conduct thorough and comprehensive studies that will permit sound determinations as to the effect of increases upon the movement of traffic, and as to any inequities or improper relations in refrigeration charges that may have developed from changed conditions since their original establishment.

We conclude that there is insufficient evidence for a finding as to increased charges applicable to shipments transported in mechanical refrigerator cars.

We further conclude that to enable the petitioning carriers, under honest, economical, and efficient management, to provide adequate refrigeration service and specifically to meet increased costs of rendering that service, the basic refrigeration charges may be increased as herein specified, and that the charges so increased will be just and reasonable for the future:

1. Except as otherwise provided in these findings on conclusions, all the basic charges of the petitioning carriers enumerated in appendix A hereto may be increased 15 percent within and between all territories. By basic charges are meant those now in effect, or now published to become effective but not yet effective, including increases made effective under authority granted in Ex Parte Nos. 162 and 166, and including charges that may be under investigation in other proceedings, as well as charges that have been prescribed by us, when and as such charges become effective, subject to any exceptions specifically made in the orders.

2. Charges for salt may be increased to $1.04 per 100 pounds.

An appropriate order modifying outstanding orders so as to permit the establishment of the increases authorized, will be entered.

ARPAIA, *Chairman*, concurring:

I agree that the increase in petitioners' charges for refrigeration services should be limited to 15 percent, but for reasons different from those expressed by the majority.

The majority believe that a finding is warranted that the petitioners are sustaining a total deficit exceeding 23 percent of the aggregate revenue received from refrigeration services. Nevertheless they limit the increase to 15 percent on the ground that a substantial amount of the affected traffic cannot bear anything higher. The effect of the majority report is to hold that there is justification for requiring the maintenance of noncompensatory charges for accessorial services.

It is my own view that charges for accessorial services should be fully compensatory. The Commission has never held otherwise. However, the petitioners' evidence falls short of justifying the full increase which they have requested. The traffic and cost studies, on which determination of the issue here presented principally depends, are inadequate. The traffic study, for example, contains a disproportionate number of shipments accorded standard refrigeration service; it does not include any shipments moved under any of the various modified services where no bunker re-icing service is performed, such as rule 240; and it is overweighted with long-haul shipments. It also excludes many origin and destination areas where perishable traffic moves. All these factors have a bearing on the accumulation of the aggregate costs which are compared with the refrigeration revenues. Furthermore, the petitioners did not develop unit costs reflecting current operating practices, such as switching of perishable traffic by types of service at the various icing stations. In spite of the deficiencies in petitioners' traffic and cost studies, unquestionably railroad costs, including cost of refrigeration, have continued to rise since the last increase in refrigeration charges was authorized in Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I. C. C. 403.

The 15-percent increase authorized by the majority is, in my opinion, the maximum justified on this record. I, therefore, concur in the result.

COMMISSIONER FREAS concurs in the result except with respect to mechanical refrigeration.

ELLIOTT, *Commissioner*, dissenting in part:

I agree with the above report except that I would approve an increase in refrigeration charges of at least 20 percent, and I would make such increased charges likewise applicable to shipments transported in mechanical refrigerator cars.

CLARKE, *Commissioner*, dissenting:

I am opposed to a uniform increase of 15 percent on each and every rate or charge published in section 2 of the Perishable Protective Tariff as authorized by the majority. It is a well-established principle that charges for refrigeration service should cover the cost thereof, plus a fair return, but no more. All of the earlier refrigeration decisions proceeded upon the logical theory that precise charges, based on costs alone, would be required. That particular theory is abandoned, however, by the majority.

It is my opinion that authorizing a flat percentage increase in charges for accessorial services, regardless of the results shown for particular commodities or particular classes of service, violates the basic precepts of reasonableness and lawfulness in the Interstate Com-

merce Act. It results in increasing charges which are already equal to or above total costs and overcharging certain commodities, or certain movements, or certain types of service, in order that other commodities or other movements or other types of service may be moved at a loss.

The majority states "In the establishment of a structure of charges of national scope it is impracticable to accomplish uniformity in the relation to costs." However, the present structure of charges, based on costs, is national in scope and, as indicated, it covers numerous specific services, commodities, and origin and destination groups. The very cost figures submitted by the carriers and used in the report, with certain adjustments, to show nationwide revenues, costs, and losses, were initially compiled from more specific data which show separately the costs and revenues for a particular type of service from a selected origin group to a selected destination group on a particular commodity. If such data is not sufficiently complete to arrive at separate increases for each service, or each commodity, it is due entirely to the failure of the carriers to develop such data. To reward them for that failure by allowing a blanket increase, knowing that it will result in certain commodities and certain services bearing more than their fair share of the costs involved, seems incongruous.

I would authorize increases only in those instances where it has been clearly shown that the charges made do not cover the cost of rendering the services involved and then no more than the amount necessary to close the gap between the specific charges and the comparable costs.

COMMISSIONER MITCHELL, being necessarily absent, did not participate in the disposition of this proceeding.

COMMISSIONER MURPHY did not participate in the disposition of this proceeding.

APPENDIX A

Statement showing the increases proposed by the petitioners in the charges published in sections 2 and 4 of Perishable Protective Tariff No. 16, Agent Jamison's I. C. C. No. 31

SECTION 2 CHARGES

Increase by 30 percent of refrigeration charges set forth in this section of the tariff, and any other charges provided in other sections that are based thereon, with the following exceptions:

Increase to $8.40 per ton, the present charge of $6.61 per ton for ice supplied in retop icing as published in Rule 248 of the tariff.

Increase the charges of $5.49, $5.69, and $6.01 per ton, presently published in Exception 7 of Rule 240, to $5.72, $6.73, and $7.03, respectively.

Increase to $1.02 per 100 pounds for salt, the present charge of $0.99 per 100 pounds published in Exception 7 of Rule 240.

No increase is proposed in the present charges provided for hazard, bunker, and body repairs, or for those provided in the following rules of the tariff:

Number	*Number*	*Number*
75 B–1	105 D	231 D
75 D–1	140	232
75 E	215 E	232½
75 F	215 Exception 3 (a)	237
75 J	215 Exception 3 (b)	246 B–1, Part 1
90 A	228 C	246 B–2, Part 1
		246 B–2, Part 2

SECTION 4 CHARGES

Increase all charges for services of initial icing and re-icing published in this section, and any other charges provided in other sections that are based thereon, as indicated below.

Territory	Charges per ton for ice supplied in bunkers of cars	
	Present	Proposed
California, except stations embraced below; Sparks, Nev.	$4.04	$5.07
Michigan (Northern Peninsula); Minnesota; Montana; North Dakota; South Dakota; Wisconsin	4.96	5.70
Colorado; Idaho; Oregon; Stations on main line of the Union Pacific Railroad Company as follows: Arcadia, Blakes Junction, Nyssa and Ontario; also stations on Brogan Branch, Brogan to Dennis, inclusive; Homedale Branch Dunaway to Napton, inclusive; Oregon Eastern Branch, Burns to Malheur Jct., inclusive; Homestead Branch, Blakes to Robinette, inclusive; Utah; Wyoming	5.43	8.34
Florida	5.49	5.72
California; Great Northern Railway Company, stations of Dolton Spur, Kalina Spur, Kandra, Lisky Spur, Stronghold, Suty Spur; Southern Pacific Company stations Copic, Dorris, Hatfield, Homestead, MacDoel, May, Mount Hebron, Somerset, Staley, Stronghold, Tuber, Tule Lake; Oregon; All stations except those named above; Washington	5.62	6.93
Alabama, except Mobile; Georgia; North Carolina; South Carolina	5.69	6.73
Illinois; Iowa; Kansas; Missouri; Nebraska	5.75	7.06
Connecticut; Delaware; District of Columbia; Indiana; Kentucky; Maine; Maryland; Massachusetts; Michigan (Southern Peninsula); Mississippi; New Hampshire; New Jersey; New York; Ohio; Pennsylvania; Rhode Island; Tennessee; Vermont; Virginia; West Virginia	6.01	7.03
Arizona; California; Stations in Coachella, Imperial and Palo Verde Valleys; Nevada, except Sparks	6.28	7.76
Mobile, Alabama; Arkansas; Louisiana; New Mexico; Oklahoma; Texas	6.68	7.16

CHARGE PER TON OF ICE SUPPLIED IN BODY OF CAR

All territories—Increase to $8.40 per ton for ice supplied in body of car, from $6.61 per ton presently published in Rule 400.

CHARGE PER 100 POUNDS FOR SALT

Increased to $1.02 per 100 pounds the charge of $0.99 presently provided for application on salt, except that the present charge applicable at Huntingburg, Ind., would be reduced to $1.02 per 100 pounds.

CHARGE PER ICING FOR SWITCHING

Territory	Charge	
	Present	Proposed
Arizona; California (except stations on the Modesto and Empire Traction Company); Nevada; Oregon	$0.60	$1.02
Florida; Georgia; North Carolina; South Carolina; Virginia	.67	1.15
Alabama; Kentucky; Louisiana east of the Mississippi River; Mississippi; Tennessee; Galveston, Tex.:		
On bananas, or bananas and coconuts mixed	.67	1.15
All other traffic	1.06	1.82
All other territory	1.06	1.82

APPENDIX B

Some of the various forms of refrigeration services provided in the numerous rules of the Perishable Protective Tariff

Standard refrigeration:

Dry car used with re-icing to capacity of bunkers at all regular icing stations, in transit.

Car pre-iced by carrier with re-icing to capacity of bunkers at all regular icing stations in transit.

Other refrigeration services:

Rule 239:

Pre-icing and replenishing by carrier with: (1) no re-icing in transit, (2) one re-icing in transit, (3) two re-icings, or (4) three re-icings in transit.

Rule 240:

Initially iced by carrier or shipper with no re-icing in transit.

Initially iced by carrier in transit with no re-icing in transit.

Rule 242:

Top or body icing by shipper at origins in western territory.

Rule 243:

Top or body icing by shipper at origins in eastern and southern territories.

Rule 245: (Applies from origins in Arizona and California.)

Precooled and pre-iced by shipper with: (1) no re-icing in transit, (2) one re-icing in transit, (3) two re-icings, or (4) three re-icings in transit.

Precooled and afterwards initially iced by carrier with: (1) no re-icing in transit, (2) one re-icing in transit, (3) two re-icings, or (4) three re-icings in transit.

Pre-iced and after loading precooled and replenished by carrier with: (1) no re-icing in transit, (2) one re-icing in transit, (3) two re-icings, or (4) three re-icings in transit.

Precooled by carrier with no re-icing in transit.

Rule 247: (Applies from origins in western territory.)

Initially iced by carrier or shipper with: (1) one re-icing in transit, or (2) two or more re-icings in transit.

Rule 248:

Retop iced by carrier in transit.

Rule 249: (Applies from origins in Arizona and California.)

Pre-iced or iced after loading by carrier with: (1) one re-icing in transit, (2) two re-icings in transit, or (3) three re-icings in transit.

Initially iced by shipper with: (1) one re-icing in transit by carrier, or (2) two re-icings in transit.

Rule 251: (Applies from origins in Florida group B.)

Initially iced by carrier with one re-icing in transit.

Rule 252: (Applies from origins in Florida group B.)

Initially iced by shipper with one re-icing in transit by carrier.

Rule 254: (Applies from origins in western territory.)

Pre-icing and replenishing by carrier with (1) no re-icing in transit, (2) one re-icing in transit, (3) two re-icings, or (4) three re-icings in transit.

Rule 255:

Half-stage refrigeration service.

Rule 258: (Applies from origins in eastern and southern territories.)

Initially iced by carrier with one re-icing in transit by carrier.

APPENDIX C

Table showing the petitioners' computations of the cost of haulage of ice for the year 1951 over the lines of 14 selected carriers

	Amount	Net amount applicable
1. Maintenance of way and structures	$572, 101, 178	
2. One-third of item 1, varying with use	190, 700, 393	
3. Deduct terminal portion, 33.4 percent [1] of item 2	63, 522, 301	
4. Net amount of maintenance of way and structures applicable as line haul		$127, 078, 092
5. Total maintenance of equipment	741, 857, 453	
Deductions:		
6. Freight-train cars—Repairs	306, 563, 596	
7. Freight-train cars—Depreciation	63, 291, 601	
8. Freight-train cars—Retirements	492, 675 (Cr.)	
9. Total for deductions	369, 362, 522	
10. Balance, item 5 minus 9	372, 494, 931	
11. Deduct from item 10, 33.4 percent [1] freight terminal expenses	124, 078, 062	
12. Line-haul portion, item 10 minus item 11	248, 416, 869	
13. Eighty percent of item 12, varying with use	198, 733, 495	
14. Deduct 15 percent of $25,305,332 overhead expenses for freight-train car repairs, depreciation, and retirements, charged to superintendence, included in item 5	3, 795, 800	
15. Net amount, maintenance of equipment applicable as line-haul expenses		194, 937, 695
Transportation expenses:		
16. Superintendence	42, 395, 266	
17. Deduct from item 16, 33.4 percent [1] freight terminal expenses	14, 121, 863	
Balance, item 16 minus item 17	28, 273, 403	
18. Fuel for train locomotives	195, 513, 583	
19. Train power produced	512, 667	
20. Train power purchased	5, 328, 651	
21. Water for train locomotives	9, 925, 345	
22. Lubricants for train locomotives	7, 441, 104	
23. Other supplies for train locomotives	3, 574, 537	
24. Total transportation expenses applicable as line-haul expenses		250, 569, 290
Summary:		
25. Total operating expenses applicable as line-haul expenses (items 4, 15, and 24)		572, 685, 077
26. Gross ton-miles including locomotives, tenders, and cabooses, but not including nonrevenue ton-miles and their proportionate share of tare weight of cars, locomotive, tender, and caboose ton-miles		*Gross ton-miles* 766, 865, 172, 000
		Mills per ton-mile
27. Increase in freight portion of railway operating expenses per ton-mile of ice hauled in refrigeration service (item 25 divided by 26)		0. 74679
28. Add 6.50 percent payroll tax on 60 percent of item 27		*0. 02912*
29. Cost of haulage of ice not including the cost of any additional train service		0. 77591
30. Add 49.265 percent [2] for additional train service and extra hauls at originating points		*0. 38225*
31. Total cost incident to the hauling of ice in bunkers of refrigerator cars		1. 15816

[1] Represents the ratio of yard proportion of accounts 202 to 221, plus accounts 377 to 391, inclusive, to the totals of these accounts, plus accounts 392 to 402, 412 and 413.

[2] To provide for the cost of added train-miles and terminal hauls not included in the calculations for year 1930, the cost of 0.502463 mill not including such cost was increased to 0.75 mill per net ton-mile, or 49.265 percent

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Supreme Court, U.S.
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, CALIFORNIA CITRUS LEAGUE, WESTERN GROWERS ASSOCIATION, ET AL.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ARMOUR AND COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida.

MOTION TO AFFIRM.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 663

Florida Citrus Commission, Growers and Shippers League of Florida, Florida Fruit and Vegetable Association, Florida Railroad and Public Utilities Commission, California Citrus League, Western Growers Association, et al.,

Plaintiffs-Appellants,

vs.

United States of America, Interstate Commerce Commission, Atlantic Coast Line Railroad Company, Armour and Company, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida.

MOTION TO AFFIRM.

Railroad Appellees, as shown in Appendix A hereto attached, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final decree of the Three-Judge District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal from the final decree entered September 7, 1956, by a district court of three judges, constituted pursuant to 28 U.S.C. 2284 and 2325, dismissing appellants' complaints which sought to set aside an order made by the Interstate Commerce Commission January 9, 1956, in I.C.C. Docket No. 31342, *Proposed Increased Refrigeration Charges,* 297 I.C.C. 505, authorizing, with certain exceptions, an increase of fifteen percent in the basic charges for refrigeration service within and between all territories.

In *Increased Railway Rates, Fares and Charges, 1946,* 266 I.C.C. 537, 600-602, decided December 5, 1946, the Commission authorized an increase of 15 percent in refrigeration charges; and, in *Increased Freight Rates, 1947,* 270 I.C.C. 403, 461, decided July 27, 1948, it authorized a similar increase. Additional increases in refrigeration charges sought by the carriers were denied by the Commission in *Increased Freight Rates, 1948,* 276 I.C.C. 9, 107-109; *Increased Freight Rates, 1951,* 281 I.C.C. 557, 604-606; and *Increased Freight Rates, 1951,* 284 I.C.C. 589, 639, on the ground that the carriers had not made a showing that the several 15 percent increases authorized in the 1946 and 1947 proceedings were insufficient to compensate them adequately for all costs incident to furnishing the services (276 I.C.C. 9, 109). Thus when proceedings were commenced in Docket No. 31342, refrigeration charges had been increased only 32.25 percent (15% plus 15%) since June 30, 1946, whereas railroad freight rates generally had been increased 78.9 percent since that date. *Increased Freight Rates, 1951,* 289 I.C.C. 395, 396.

In an effort to redress this situation, and to demonstrate that refrigeration costs had been subject to the same inflationary tendencies as other transportation costs, the carriers conducted comprehensive traffic and cost investigations for the full year 1951 which disclosed that refrigeration service was being performed at an annual loss of $11,000,000 to $13,000,000 (Tr. 17-20*), referred to in the Commission's Report as "a deficit in excess of $12,000,000 per annum" (297 I.C.C. 505, 510).

Accordingly, practically all the carriers in the country, by petition filed with the Commission on August 31, 1953, as later amended at the hearing, asked the Commission to permit increases in their refrigeration charges and modify all outstanding orders so that such increases might be made effective. In the petition, the carriers stated that cost studies recently completed by them showed that the cost of performing refrigeration services, on the basis of 1951 experience, exceeded by not less than $12,000,000 the total revenue received; that the increased charges proposed by them would not be in excess of all the costs occasioned by the services plus a reasonable return on investment; and that the proposed charges were essential for the maintenance of adequate and efficient refrigeration services.

The increases proposed by the carriers are shown in detail in Appendix A to the Commission's Report (297 I.C.C. 505, 556-557). Generally, the proposal was to increase by 30 percent, with certain exceptions, the charges published in Section 2 of the Perishable Protective Tariff, and those provided in other sections based thereon, and to increase by specified amounts the charges

* These, and similar figures used herein, refer to appropriate pages of the transcript of testimony in Docket No. 31342.

published in Section 4 of the same tariff. The Section 2 charges apply generally to refrigeration services in connection with the movement of fresh fruits and vegetables, berries, melons and processed foods whereas the Section 4 charges apply for the most part in connection with the movement of fresh meats and packinghouse products, dairy products, fish, beer and bananas and coconuts.

Hearings commenced December 9, 1953 and were concluded January 27, 1955. Voluminous evidence was submitted both by the carriers and by protestants. The carriers presented the results of a study of ice costs at 1678 locations on 124 railroads throughout the country and the results of an extensive traffic study embracing 13,975 shipments. The record contains 295 exhibits and 4369 pages of testimony. The issues were thoroughly considered.

The Commission delivered its findings and conclusions in a Report and Order dated January 9, 1956. It found that the total restated cost under Section 2, computing return on investment at only 4%, was 23.9 percent in excess of applicable revenue (297 I.C.C. 505, 527-528, 543) and determined a restated ice cost under Section 4 which is approximately 17 percent in excess of indicated revenue.* Notwithstanding these findings, the Commission authorized an increase of only 15 percent in the basic refrigeration charges under both Sections 2 and 4, stating:

> "• • • The evidence is convincing that an increase as proposed in the total cost of transportation to the shipper of commodities under refrigeration would cause an acceleration of diversions of that traffic

* The Commission's restated total cost of ice is $33,420,109 (297 I.C.C. 505, 532). The total indicated revenue obtained by multiplying the tons of bunker and body ice by the Section 4 charges is $28,526,814 (297 I.C.C. 505, 527, 532).

from the rails, or a loss of traffic otherwise, to such an extent as to result in a substantial reduction in revenue. It appears that a substantial amount of the affected traffic could not bear the increased cost of transportation which would result from general increases in charges for refrigeration services sufficient to cover the total costs thereof." (297 I.C.C. 505, 553)

Petitions for Reconsideration were filed by appellants with the Interstate Commerce Commission on March 2, 22, 23 and 30, 1956 and were denied by the Commission in an order entered April 16, 1956.

The increased refrigeration charges authorized by the Commission were published in Supplement 27 to Perishable Protective Tariff No. 16 and became effective April 17, 1956.

Complaints seeking to have the Commission's order of January 9, 1956 annulled and set aside were filed in the District Court prior to the effective date of the increased refrigeration charges. On final hearing, the Three-Judge Court dismissed the complaints. Final decree of the Court was entered September 7, 1956.

ARGUMENT.

The final decree of the District Court is plainly correct.

Appellants present what they term "the threshold question", three questions subsidiary thereto, and six questions on the merits. None of them warrants further argument before this Court.

The Merits of the Case.

In their Statement as to Jurisdiction (p. 4), appellants assert that the threshold question presented by the appeal is whether the statutory Three-Judge Court erred in refusing to consider the merits of the case, and, acting on its erroneous view that there was no justiciable issue, in dismissing the complaint. Thus, appellants incorrectly state that the District Court failed to consider the merits of the case.

Their statement in this regard is plainly erroneous. While the District Court held, contrary to appellants' contention, that the proceeding before the Commission was a "general revenue case", and that legal principles pertinent to such a case have application, it determined that the evidence warranted the findings and conclusions of the Commission and the entry of its Order.

The District Court expressly found that the evidence relating to the traffic study *"was of a kind and quantity sufficient to permit a generalization upon which findings could be based and conclusions drawn"* (p. 11a);* that

* This, and similar figures used herein, refer to appropriate pages of the District Court's opinion attached as Appendix I to Appellants' Statement as to Jurisdiction.

the Commission's finding that any deficiency in Section 4 charges does not relieve Section 2 traffic of the responsibility of bearing the full cost of that service is *"supported by the evidence"* (p. 13a) and that the Commission's findings with respect to "a vast multitude of specific facts" and its ultimate findings with respect to the amount of the deficit sustained by the carriers from the rendition of refrigeration services and the necessity for an increase of 15 percent in refrigeration charges in order to enable the carriers to provide adequate and efficient refrigeration service *"are supported by substantial evidence and afford an adequate basis for the Commission's* conclusions" (pp. 12a-13a).

Further, the Court expressly stated that other questions posed by plaintiffs and not discussed *"have been considered and found to be without merit or inapplicable"* (p. 16a).

In the circumstances, it is plainly error for appellants to assert that the Three-Judge District Court refused to consider the merits of the case.

The Character of the Proceeding Before the Commission.

The District Court sustained appellees' position that the proceeding before the Commission was a general revenue proceeding; that the Commission's order was permissive in character; that the lawfulness of individual charges was not considered or decided; and if the increased charges as applied to appellants' particular situation can be shown to be unjust or unreasonable, their remedy is clearly by proceedings instituted under Sections 13, 15 and 16(1) of the Interstate Commerce Act (pp. 11a, 16a), citing in particular the sound and well-reasoned opinions in *Algoma Coal and Coke Company* v.

United States, 11 Fed. Sup. 487, and *Koppers Company* v. *United States*, 132 Fed. Sup. 159 (pp. 6a-7a, 14a-16a).

That the proceeding was similar to a general revenue proceeding is abundantly demonstrated by the fact that the railroads in their Petition sought a uniform nationwide increase in refrigeration charges to meet the cost of the service with a view to maintaining adequate and efficient refrigeration service; that the Commission concluded that the carriers should be permitted to increase their refrigeration charges by 15 percent to enable them, "under honest, economical and efficient management, to provide adequate refrigeration service" (297 I.C.C. 505, 554); that the Commission's order is permissive only; and that the Commission did not pass upon the lawfulness or reasonableness of individual charges for any specific type or character of refrigeration service.

These are all incidents of a general revenue proceeding. The Commission not only employed the language of Section 15a(2) of the Act (49 U.S.C. 15a(2)) in its conclusion,* but admonished the carriers, as is its practice in general revenue cases, after the increased charges became effective, to make necessary adjustments where required to eliminate "any inequities or improper relations in refrigeration charges that may have developed from changed conditions since their original establishment" (297 I.C.C. 505, 554).

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* In its opinion, the District Court inadvertently referred to the provisions of Section 15a (2) of the Interstate Commerce Act as they appeared in the Transportation Act of 1920 prior to their amendment by the Emergency Railroad Transportation Act, 1933 (p. 5a). However, the amended rule of ratemaking continues to emphasize the carriers' need of adequate revenues and the present provisions are not essentially different in this respect from those which they superseded (**Florida v. United States**, 292 U.S. 1, 6-8).

Appellants argue that the Commission's decision does not contain the reservation usually found in general revenue cases to the effect that the increases authorized are not considered as prescribed within the meaning of the decision in *Arizona Grocery Company* v. *A.T.&S.F. Ry. Co.*, 284 U.S. 370, (pp. 33-34). However, the admonition that the carriers, after the increased charges become effective, shall eliminate inequities and improper relations in charges serves the same purpose. It is similar to the admonition expressed by the Commission in the general revenue cases.* The District Court correctly said:

> "Nor does the omission of a saving clause, such as was in the order considered in *King* v. *United States, supra,* preclude the making of such applications or alter the duty of the Commission to consider and decide such applications. The right to apply and the duty to decide have been given by the Congress in Sections 13 and 15 of the Act. The Commission has not, and indeed could not, foreclose the right or renounce the duty in an order authorizing general increases in transportation rates or charges."

Appellants' assertion that the filing of an "additional" complaint with the Commission would be futile (p. 5), is not well founded.** Such complaint would be directed to the lawfulness of individual charges rather than to the validity of the general increase authorized in Docket No. 31342. Moreover, contrary to appellants'

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* See **Increased Freight Rates, 1947,** 270 I.C.C. 403, 454-455; **Increased Freight Rates 1948,** 276 I.C.C. 9, 46-47, 111-112; **Increased Freight Rates, 1951,** 281 I.C.C. 557, 637; 284 I.C.C. 589, 661.

** Appellants' use of the word "additional" is incorrect. No complaint of any character has heretofore been filed with the Commission.

contention (p. 22), reparation, if found due, may be awarded by the Commission under the provisions of Section 16(1) of the Interstate Commerce Act.

Affidavits, numbered Exhibits 2-11, inclusive, were offered by appellants in the District Court upon their request for a temporary restraining order in support of the contention that the grower or shipper who actually bears the refrigeration charges by absorption in the price of his product is unable to secure reparation through the filing of a complaint with the Commission. It is questionable whether such affidavits may properly be considered upon final disposition of the cause.* However, appellants' contention is wholly without merit.

The law (49 U.S.C. 8) contemplates that an award of reparation shall be made to the party actually damaged. *Dawson Produce Co.* v. *Florida East Coast Railway Co.*, 211 I.C.C. 125, 127-128; and the Commission has almost invariably awarded reparation where complainant, while not consignor or consignee in the ordinary and generally accepted sense, was, in substance, the true consignor or true consignee and paid the unlawful charges to the carriers or ultimately bore them as such. *Alemite Corporation* v. *Baltimore & Ohio R.R. Co.*, 203 I.C.C. 265, 268.**

* These **ex parte** affidavits were received by the District Court solely as a basis for appellants' claim of irreparable damage in support of their request for a temporary restraining order (Tr. p. 12). They were part of the record only for that purpose. **Gibbs v. Bush**, 307 U.S. 66, 76.

** Consignors who actually bear the charges have a superior right to reparation and will prevail in any contest with the consignees who merely pay them. **Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel and Iron Company**, 269 U.S. 217, 237-238. They may intervene in proceedings brought by consignees to protect their interests or they may claim reparation in independent proceedings on their own account. **Adams v. Mills**, 286 U.S. 397, 408-409. Furthermore, shippers who do not pay but ultimately bear the freight charges

Decisions of the Supreme Court cited by appellants (pp. 30-35) are not pertinent to the issue here involved. In *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U.S. 671, *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, and *Secretary of Agriculture* v. *United States*, 347 U.S. 645, the Court had under consideration the lawfulness of individual rates and charges rather than the lawfulness of a general increase in rates and charges designed to provide revenues sufficient for the maintenance of adequate and efficient railroad service pursuant to the provisions of Section 15a (2) of the Interstate Commerce Act. Manifestly, also, appellants' opportunity for judicial review was not here prevented by the wording of the Commission's order as was alleged in *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U.S. 498, and *Dixie Carriers* v. *United States*, 143 Fed. Sup. 844. As previously pointed out, the District Court actually reviewed the evidence, and findings and conclusions of the Commission.

The Validity of the Traffic Study.

Appellees made a most comprehensive traffic study. It involved 13,975 shipments between the principal origin and destination areas where the heaviest volume of traffic occurs.* The Commission made a painstaking and thorough analysis of the carriers' traffic study and concluded that "the computed costs of performing the refrigeration service required in the movement of the selected ship-

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may protect their claim to reparation by taking assignments from the consignees who pay the charges. **Spiller v. A. T. & S. F. Ry. Co.**, 253 U.S. 117, 135, or by obtaining stipulation to the effect that any award of reparation shall accrue to them. **American Sand & Gravel Co. v. Chicago & N. W. Ry. Co.**, 148 I.C.C. 343, 346.

* Traffic studies deemed typical of the whole rate structure have been approved by the Supreme Court. **New England Divisions Case**, 261 U.S. 184, 197-199; **King v. United States**, 344 U.S. 254, 275-276.

ments do not overstate the average costs for the traffic as a whole" (297 I.C.C. 505, 511-521). The Three-Judge District Court examined the evidence relating to the traffic study and said:

> "The methods used in the study are recited at length and in detail in the Report of the Commission. They need not be set forth here. It is enough that we say that the evidence submitted was of a kind and quantity sufficient to permit a generalization upon which findings could be based and conclusions drawn" (p. 11a).

(a) *Representative Character of Traffic Study*

Because the study was limited to shipments between the principal origin and destination areas, it did not embrace shipments between origin and destination areas where a lesser volume of movement occurs. For this reason the Commission stated that the study "afforded no mathematical chance for all of the railroads, all origin and destination areas, and all of the affected traffic to be included, and may have rendered it unrepresentative as to the whole body of traffic" (p. 523). However, the Commission concluded that the composition of the traffic study in this respect reduced rather than overstated the traffic costs as a whole, saying:

> "The origin and destination areas selected produce and consume, respectively, a majority of all fruits and vegetables shipped, and a great preponderance of the movement of that traffic is over a relatively few routes. *This concentration of movement and the resulting heavier volume of icing operations tend to produce lower unit costs than prevail in connection with the traffic to, from, or between the excluded areas where the volume of movement is much less.*" (p. 521). (Italics supplied.)

Appellants contend that the Commission's conclusion is incorrect (p. 6). They are obviously in error. The Commission's conclusion is soundly based on abundant evidence of record which indicates that the traffic study embraces the principal movement of perishables within this country and that the unit costs of providing refrigeration service are greater in instances where a lesser movement is involved. The cost of ice is the principal element in the cost of providing Section 2 refrigeration service. It constitutes 63.3 percent of the total cost (297 I.C.C. 505, 543). And the average cost of ice included in the traffic study is $6.44 per ton whereas the average cost of all ice for the entire country, including that in the traffic study, is $6.62 per ton (Exhibit Nos. 164-166, 256). This fact alone amply confirms the Commission's finding that the unit costs in the traffic study are lower than those that would obtain if the traffic study had been expanded to include all areas of the country. Its finding in this respect is not only abundantly supported by the record but is one which the Commission by virtue of its specialized knowledge of transportation problems is peculiarly qualified to reach. In *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481, the Supreme Court stated:

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission" (p. 481).

(b) *Exclusion of Rule 240, 242 and 243 Shipments*

In order that the traffic study might be completed within a reasonable length of time, it was restricted to

shipments on which bunker reicing service was performed. The refrigeration services provided under what are termed Rules 240, 242 and 243 do not require bunker reicing. Consequently, shipments which moved under these rules were excluded. However, the revenue involved is relatively minor as compared with the revenue derived from the performance of standard refrigeration and other bunker-reicing services (Tr. 893-894, 1358-1361, 1396-1403). Moreover, due to shipment in cartons rather than iced crates, lettuce, carrots and other vegetables which moved in 1951 under Rules 240 and 242 are now moved largely under standard refrigeration, a form of service completely covered in the traffic study. The Commission approved the exclusion of shipments under Rules 240, 242 and 243 from the traffic study, stating:

> "Some of the protestants object to the exclusion of the rule 240, 242 and 243 shipments from the carriers' sample, laying particular emphasis on the large number of such shipments, as indicated by the table on page 11 hereof, which approximated 43 percent of the total. Such shipments are iced initially by the shipper and are not reiced in transit. Therefore, the amount of service given them and the revenue therefrom are minor compared with bunker-reiced shipments. Although the number of excluded shipments appears large, the revenues and costs are relatively small, indicated by the petitioners to be less than 2 percent of the total.
>
> • • •
>
> "With the advent of vacuum precooling and the described changes in packaging since 1951, there has been, as herein noted, an important shift from the use of modified services to standard refrigeration from origins in Texas, Arizona, and California, tending to minimize any deficiency of the traffic sample

resulting from the exclusion of shipments not accorded reicing in transit. A notable example, is the shift from rule-242 service to standard refrigeration in the movement of lettuce and carrots from Arizona and California" (297 I.C.C. 505, 518-519).

Appellants contend that the traffic study is rendered deficient because of the exclusion of shipments not bunker reiced (pp. 5-6, 19-21). Their contention is wholly unsound. Shipments which did not receive bunker reicing service amounted to 43 percent of all cars involved. However, as stated by the Commission, the number of these cars is not at all representative of their relative significance. The refrigeration revenue on these shipments constitutes only a relatively small percentage of the refrigeration revenue on shipments moved under standard refrigeration and a substantial number of shipments which moved under Rules 240 and 242 in 1951 are now moving under standard refrigeration (297 I.C.C. 505, 521).

Difference in Treatment of Charges Under Section 2 and Section 4.

Section 4 charges reflect only the cost of ice and salt and the cost of switching. Section 2 charges reflect, in addition, ice haulage, supervision, bunker damage, accounting and hazard. Of these additional elements, ice haulage, supervision and bunker repairs are the most significant in amount (297 I.C.C. 505, 543).

Section 4 charges have never reflected these additional elements of expense. On the other hand, the Section 2 charges have reflected them for many years. Treatment of ice haulage and bunker repairs as a part of Section 2 charges originated in the *Arlington Heights* case in 1911 (20 I.C.C. 106, 108, 109) and inclusion of supervision as a part of Section 2 charges originated in the *Deciduous*

Fruit case in 1914 (32 I.C.C. 17, 25). In other words, these additional elements of expense have never been a part of Section 4 charges; but have been a part of Section 2 charges for more than 40 years.

In Docket 20769, 215 I.C.C. 684, 798, decided June 2, 1936, the Commission found that the additional elements of expense should be included in the charges assessed under Section 4.* However, the federal court stayed the Commission's Order requiring that these additional elements be included in the Section 4 charges, and the Commission's Order was subsequently vacated (297 I.C.C. 505, 524). As a consequence, revised Section 4 charges, without the addition of the extra elements, were published effective February 1, 1941 (Tr. 3418-3419) and have been continued in effect without the addition of such elements ever since, *i.e.*, for the past 16 years.

Appellants argue (pp. 6, 14-17 and 24-25) that exclusion of the additional elements of expense from charges under Section 4 constitutes unjust discrimination and undue preference in violation of Sections 2 and 3(1) of the Interstate Commerce Act (49 U.S.C. 2, 3(1)). Their contention in this respect is entirely invalid.

Whether discrimination or preference exists, and, if so, whether such discrimination is "unjust" or preference "undue" are questions of fact committed by Congress to the Commission for determination. *United States* v. *Chicago Heights Trucking Company*, 310 U.S. 344, 352-353; *Board of Trade* v. *United States*, 314 U.S. 534, 546;

* In Docket 20769, 215 I.C.C. 684, 798, the Commission ordered the addition of the elements in question to the charges under Section 4 in order to prevent violation of section 1 of the Interstate Commerce Act. It did not predicate such action upon any theory that the additional elements should be added to the Section 4 charges in order to prevent discrimination.

and *Lynchburg Traffic Bureau* v. *United States,* 84 Fed. Sup. 1012, 1016-1017, affirmed *per curiam,* 338 U.S. 864, 901.

The record contains no evidence of a competitive relation between Section 2 and Section 4 shippers upon which a finding of unjust discrimination or undue preference could be based. It shows that an entirely different group of commodities moves under Section 2 than under Section 4, and that the primary Section 2 traffic, such as fruits and vegetables, originates at points which geographically vary from those at which the principal Section 4 traffic, such as fresh meats, originates (Tr. 19, 1383-1389, 2697, 3005, 3306, 3688).

The different treatment of charges under Sections 2 and 4 has existed for more than 40 years. Yet, there is no evidence of injury sustained by Section 2 shippers by way of loss of sales or markets or any evidence that the meat and dairy interests who ship their products under Section 4 have the capacity to fix the prices for fruits and vegetables shipped under Section 2 by reason of any difference in the construction of charges under Section 2 and Section 4. With this situation in mind, the Commission correctly concluded:

> "Concerning the allegation of discrimination, it is noted that the section-2 and section-4 charges do not apply on like traffic, and that, as to the alleged undue prejudice, there is no showing that any failure of the section-4 charges to cover the above-mentioned elements has caused, or is likely to cause, any disadvantage or injury to the section-2 traffic or any shippers thereof. Thus, the claim of unjust discrimination or undue preference is not soundly based. In these circumstances, any existing deficiency in the section-4 charges does not relieve section-2 traffic of the responsibility of bearing the full cost of that service

and is not a consideration in the determination of the lawfulness of the increase proposed in the section-2 charges" (297 I.C.C. 505, 524).

The District Court stated that such discrimination as exists was not caused by the Commission's order assailed herein. But, it did not find that such discrimination exists, specifically stating "this we do not decide" (p. 13a). Moreover, it declared that "differences in rates and charges as affecting different classes of non-competing shippers or consignees are not *per se* unjustly discriminatory" and "We find ourselves in accord with the Commission's position" (p. 13a).*

Uniform Percentage Revision.

Appellants challenge the lawfulness of a uniform nationwide increase in all charges for refrigeration service in view of the variation between revenues and costs for different types of refrigeration services (pp. 5, 17-18).

Appellees submit that the Commission's treatment of the matter is entirely sound. Uniform nationwide percent-

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* Appellants state that the Commission authorized an increase of 15 percent in the varying Section 2 charges for salt whereas it authorized an increase of only 5 percent in the Section 4 charges for salt (p. 16) and that in restating costs of Section 2 services, it used an increase of 146 percent in the switching cost factor although it authorized an increase of only 15 percent in the Section 4 switching charges (p. 17).

Appellants compare unlike items. The varying Section 2 charges where different quantities of salt are used are designed to cover the cost of the additional ice required on account of meltage caused by the presence of the salt and not solely the cost of the salt. Moreoever, the increase in the switching cost factor actually reflected in the increased Section 2 charges is 15 percent of the amount included in the prior charges for switching—not the 146 percent cost factor used in the computation of the 23.9 percent loss incurred in icing Section 2 traffic.

age increases were authorized in *Increased Railway Rates, Fares and Charges, 1946,* 266 I.C.C. 537, 600-602, and *Increased Freight Rates, 1947,* 270 I.C.C. 403, 461. As the Commission pointed out in *Charges for Protective Service to Perishable Freight,* 215 I.C.C. 684, 730,

> "the handling of refrigerated traffic should be considered as an integrated national service, and when so considered, it is clear that charges should be fitted to its support and maintenance as a whole."

The application of a nationwide uniform percentage increase in determining charges for refrigeration service merely represents an extension of the practice approved by the Commission in Docket 20769, 215 I.C.C. 684, 721, 731, 750, 760, 770, when it placed haulage cost, bunker repairs, and station and auditor's accounting on a national basis, ice costs on a territorial group basis, and switching charges and supervision costs on a regional basis in order to promote uniformity in charges and to preserve competitive relationships. Salt cost also has long been established on a national basis. Practically all elements of cost, therefore, are already predicated on a national, territorial or regional basis. In *Charges for Protective Service to Perishable Freight,* 241 I.C.C. 503, 529, the Commission explained the reason for such treatment, stating:

> "The spreading of the aggregate cost of this switching service over the total number of shipments under refrigeration by means of a specific charge per icing promotes uniformity of charges among both shippers and carriers. It is in no wise different in theory from the practice whereby the charge per ton of ice is made uniform throughout a wide territory, although the actual cost per ton at one icing station is rarely the same as the actual cost at another and in many instances the difference is pronounced. This practice

> has obtained for many years, was recognized as proper in the prior report herein, and has not been attacked. The same principle is involved in group line-haul rates, where it frequently happens that hundreds of miles less transportation will be given the shipments of one consignor than of another for the same rate. As late as our report in *General Commodity Rate Increases, 1937,* 223 I.C.C. 657, 743, we cited *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U.S. 456, in support of the principle that 'an individual shipper, because of his interest in the adequate maintenance of "all the railroads necessary to do the business of a rate territory or section"', *could not complain of a general level of rates higher than would be reasonable considering the immediate service rendered to him alone."* (Emphasis supplied.) (p. 529).

Appellants or members of organizations represented by them ship perishable commodities from California, Arizona and Florida. It is highly significant that these shippers, commodity by commodity, will not suffer any detriment from the assessment of the uniform increase of 15 percent authorized by the Commission. A large number of the different refrigeration services under Section 2 are utilized by shippers from these states in each commodity group. While there is some variation in cost versus revenue in the case of the different services, shippers in each commodity group use a considerable number of the different services, and when all the services used are aggregated, no commodity group will be required to pay refrigeration charge increases in excess of the loss incurred by the carriers. This is easily demonstrated.

The Commission's restatement of costs effects a reduction of 19.8 percent in the percentage of loss claimed by the carriers (29.8 percent versus 23.9 percent). Application of this reduction to the information shown in Exhibit

No. 168 produces percentages of loss varying from 15.39% to 62.43% on the principal commodities shipped from California-Arizona and Florida.*

When it is considered that these percentages of loss are based upon 1951 experience, it is evident that shippers in the principal commodity groups in the producing areas represented by appellants have received extremely generous treatment in the application of an increase in charges of only 15 percent.

Ice Costs and Charges on Territorial Group Basis.

In their proposal, the carriers observed the identical territorial ice-cost groups approved by the Commission in *Charges for Protective Service to Perishable Freight,* 215 I.C.C. 684. The Commission approved continuance of these same groups for the future. Finding 1 and Appendix A (297 I.C.C. 505, 554, 556-557). Apparently, appellees criticize continued observance of these groups in disregard of ice costs at individual icing stations and in the particular state where the ice is furnished (pp. 16-17, 19-20). Neither of these criticisms is well-founded.

The practical necessity of publishing charges on a group basis rather than by states or individual icing stations has always been recognized by the Commission. In its decision in *Charges for Protective Service to Perishable Freight,*

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*

Commodity	California-Arizona Cars†	California-Arizona Percent of Loss	Florida Cars†	Florida Percent of Loss
Melons	1819	16.59	.....	.....
Deciduous Fruits	2480	16.35	.....	.....
Vegetables	390	18.96		
Tomatoes	126	15.83	1742	15.39
Potatoes	978	45.63		
Citrus	2197	22.52	1534	25.48
Frozen Foods	256	62.43	144	53.57
All Commodities	8266	22.38	3436	22.58

†Exhibit 167

215 I.C.C. 684, 731, the Commission pointed out that the groupings were arranged with a view of equalizing the costs over the respective routes as far as practical, and stated that "it is especially desirable that the costs over the respective routes shall be as nearly equal as practicable"; and, in *Growers & Shippers League of Florida* v. *Atlantic Coast Line R.R. Co.*, 238 I.C.C. 481, 491, it stated that "uniform charges are necessary to enable growers and shippers within wide producing areas to place their shipments in large consuming markets on equal terms * * *." From at least as far back as the publication of the first perishable protective tariff in 1920, the charges for ice have been uniform throughout large areas (238 I.C.C. 481, 491).

The group principle of ratemaking has long been approved by the Commission and sustained by the courts. In *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 486, this Court held:

> "Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switching rates, is within the competence of the Commission."

See, also, *Lynchburg Traffic Bureau* v. *United States*, 84 Fed. 1012, 1015, affirmed *per curiam*, 338 U.S. 864.

The circumstance that the Commission's restated ice costs in certain origin groups, namely, California, Texas and Florida, are less than 15 percent in excess of Section 4 charges, as pointed out by appellants (pp. 16-17), is not significant. The predominant movement of perishables from these states consists of shipments of fruits and vegetables under Section 2 of the tariff* and the Commission's restated ice costs in the various groups traversed,

* During 1953, from Florida, 66,496 cars originated under Section 2 and only 258 cars under Section 4 (Tr. 3005). Only 875 digit 5 (traffic study) cars out of a total of 24,466 digit 5 (traffic study) cars or only 3.6 percent moved under Section 4 from the States of California, Arizona, Colorado, Idaho, Oregon, Texas, Utah and Washington on the contract lines of the Pacific Fruit Express Company in 1951 (Tr. 2697).

including the origin groups, are used in determining the excess of cost over revenue in the case of shipments under that section. The Section 2 shipments also traverse and terminate in higher-cost groups where the Commission's restated costs exceed charges by more than 15 percent (297 I.C.C. 505, 527, 532, 557). The important factor is the aggregate of costs over revenues for the entire movement.

So far as charges under Section 4 are concerned, the fact that the Commission's restated ice costs are less than 15 percent in excess of charges in the origin groups in question is compensated by the fact that both contract and manufacturing costs of ice have substantially increased since 1951, the date as of which the restated costs were determined (Exhibit No. 169; Tr. 3168; 297 I.C.C. 505, 532). The contract cost of ice alone increased 10.3 percent between 1951 and August 1, 1954 (Exhibit No. 169).

Appellees respectfully submit, therefore, that appellants present no substantial questions for the decision of this Court, and that the final decree of the Three-Judge District Court should be affirmed.

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January, 1957

PROOF OF SERVICE.

I, Roland J. Lehman, Counsel of Record for Railroad Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24th day of January, 1957, I served copies of the foregoing Motion to Affirm on the several parties to the case as follows:

On plaintiffs-appellants and intervening plaintiffs-appellants, by mailing a copy in a duly addressed envelope with air mail postage prepaid to their attorney of record, M. W. Wells, 135 Wall Street, Orlando, Florida.

On Florida Railroad and Public Utilities Commission, by mailing copies in duly addressed envelopes with air mail postage prepaid to Lewis W. Petteway, General Counsel, and R. Y. Patterson, Jr., Assistant General Counsel, Tallahassee, Florida.

On the Florida Citrus Commission, Growers and Shippers League of Florida, Florida Canners Association, Florida Citrus Mutual, Florida Fruit and Vegetable Association, Chase and Company, and A. Duda & Sons Cooperative Association, by mailing copies in duly addressed envelopes with air mail postage prepaid to M. W. Wells, 135 Wall Street, Orlando, Florida.

On the California Citrus League, by mailing a copy in a duly addressed envelope with air mail postage prepaid to Karl D. Loos, Munsey Building, Washington 4, D. C.

On the Western Growers Association, by mailing copies in duly addressed envelopes with air mail postage prepaid to Frank C. Brooks and Hugh T. Matthews, Jr., 305 Empire Bank Building, Dallas, Texas.

On the U.S. Department of Agriculture, by mailing copies in duly addressed envelopes with air mail postage prepaid to Paul E. Blanchard and Walter D. Matson, Office of the General Counsel, U. S. Department of Agriculture, Washington, D. C.

On the United States of America, by mailing copies in duly addressed envelopes with air mail postage prepaid to the Solicitor General, Washington 25, D. C.; John H. D. Wigger, Department of Justice, Washington 25, D. C.; and Harold Carlswell, United States Attorney, Tallahassee, Florida.

On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, General Counsel, and Charlie H. Johns, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

.....

ROLAND J. LEHMAN

APPENDIX A.

The Railroad Defendants-Appellees Are as Follows:

Atlantic Coast Line Railroad Company
Florida East Coast Railway Company
(John W. Martin, Trustee)
Seaboard Air Line Railroad Company
W. T. Jamison, Chairman and Agent, National Perishable Freight Committee

The Railroad Intervening Defendants-Appellees Are as Follows:

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Chesapeake and Ohio Railway Company
Chicago and North Western Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
Great Northern Railway Company
Illinois Central Railroad Company
Louisville and Nashville Railroad Company
Missouri Pacific Railroad Company
The New York Central Railroad Company
The New York, Chicago and St. Louis Railroad Company
The New York, New Haven and Hartford Railroad Company
Northern Pacific Railway Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
Union Pacific Railroad Company
Wabash Railroad Company
The Western Pacific Railroad Company

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, CALIFORNIA CITRUS LEAGUE, WESTERN GROWERS ASSOCIATION, ET AL., *Plaintiffs-Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ARMOUR AND COMPANY, ET AL., *Defendants-Appellees*.

Appeal from the United States District Court for the Northern District of Florida

MOTION OF ARMOUR AND COMPANY, ET AL., TO AFFIRM

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January 26, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

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Appeal from the United States District Court for the Northern District of Florida

MOTION OF ARMOUR AND COMPANY, ET AL., TO AFFIRM

These appellees, Armour and Company, The Cudahy Packing Company, George A. Hormel & Company, Kingan & Company, Oscar Mayer & Company, John Morrell & Company, The Rath Packing Company, Swift & Company, and Wilson & Company, received on December 31, 1956, appellants' Statement as to Jurisdiction in the above-entitled case.

In accordance with rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court of the United States, appellees move that the judgment of the District Court

be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

Appellees intervened in the District Court proceeding solely to defend against appellants' claim that the Commission order which is the subject of this appeal is invalid because it causes unlawful discrimination and prejudice against shippers of fruits and vegetables in favor of those who ship fresh meats and packing house products and dairy products. In this motion to affirm, appellees confine their consideration of appellants' attack on the validity of the Commission's order to that ground. The District Court held that ground to be without validity.

STATEMENT

This is a direct appeal from a judgment of a district court (three Judges sitting) which sustained an order entered by the Interstate Commerce Commission in a proceeding entitled *Proposed Increased Refrigeration Charges*, Docket No. 31342, 297 I.C.C. 505. In and by that order, the Commission authorized, with certain exceptions, increases in the charges for refrigeration services published by the railroads in a tariff known as the Perishable Protective Tariff. The circumstances which give rise to the alleged ground for invalidity of the order which appellees resist are as follows:

A complete refrigeration service involves six principal elements of service which are (1) the ice placed in bunkers of refrigerator cars, (2) the salt added to the ice, (3) the service of switching cars to ice houses, (4) the haulage of the tare weight of the ice, (5) the supervision of the services, and (6) the station and auditor's accounting required in the performance of the refrigeration services.

The Perishable Protective Tariff is published in sections. Section 2 thereof contains a schedule of charges for refrigeration services rendered on fruits and vegetables. These charges are stated in one figure per car to cover

complete refrigeration services from specified origins to specified destinations. Those charges are called "stated charges" and are designed to compensate the carriers for all six elements of the refrigeration services on what is termed herein as section-2 traffic.

In section 4 of the tariff, refrigeration charges are published on fresh meats, packing-house products, dairy products, and a few other commodities. These charges cover only particular elements of a complete refrigeration service, in contrast to the charges in section 2 which cover all elements. The elements of service for which charges are published in section 4 embrace only the ice furnished on the shipper's order, the salt furnished on the shipper's order, and the switching services to ice houses required in connection with the reicing which the shipper specifies en route. As to section-4 commodities, no specific charges are designated in the Perishable Protective Tariff for ice haulage, supervision, or station and auditor's accounting. As is developed later, such compensation as the carriers receive for those last named elements of refrigeration service on section-4 traffic comes to them from the line haul rates on those commodities.

The Commission proceeding arose upon the petition of railroads for authority to increase the particular charges as published in both sections 2 and 4 of the Perishable Protective Tariff. No authority was sought to increase charges not published in that tariff, or to name new charges, or to increase or diminish the elements of service covered by particular charges. The Commission authorized a 15 percent increase in the existing charges with which the case was concerned, except that the increase on salt was in cents per 100 pounds.

In the proceeding before the Commission, the appellants, who are or represent shippers of section-2 traffic, urged that the failure of the railroads to publish separate specific charges for ice haulage, supervision, and station and

auditor's accounting (hereinafter termed "ice haulage, etc.") incident to the refrigeration of section-4 commodities, discriminated against section-2 shippers. They urged that the Commission was without power to approve *any* increases in the stated charges on section-2 traffic unless and until new separate specified charges on the service elements mentioned were published in the Perishable Protective Tariff on section-4 traffic and such new charges were subjected to the same increases as might be authorized in the stated per car charges on section-2 traffic. The Commission rejected that contention and on page 524 of its report said:

> Concerning the allegation of discrimination, it is noted that the section-2 and section-4 charges do not apply on like traffic, and that, as to the alleged undue prejudice, there is no showing that any failure of the section-4 charges to cover the above-mentioned elements has caused, or is likely to cause, any disadvantage or injury to the section-2 traffic or any shippers thereof. Thus, the claim of unjust discrimination or undue preference is not soundly based. In these circumstances, any existing deficiency in the section-4 charges does not relieve section-2 traffic of the responsibility of bearing the full cost of that service and is not a consideration in the determination of the lawfulness of the increase proposed in the section-2 charges.

That finding of the Commission was asserted by appellants to be erroneous, and that was urged as a ground for setting the Commission order aside. The District Court disposed of that contention in the following paragraph of its opinion:

> It is strongly insisted by the plaintiffs that the differences in the treatment accorded by the Commission's order with respect to Section 2 charges on the one hand and Section 4 charges on the other result in unlawful discrimination against and unjust treatment of the users of Section 2 services. It is true that Section 4 charges reflect only the cost of ice and salt, and

the cost of switching, while Section 2 charges include also ice haulage, bunker damage, supervision and other elements. If there be any discrimination between Section 2 and Section 4 traffic, and this we do not decide, it is a discrimination which existed prior to the proceedings before the Commission whence issued the order under attack. Such discrimination, if any there be, did not result from nor was it substantially altered by the Commission's order. Whether there be an unjust discrimination is a question for the Commission. The Commission has found that the Section 2 charges and the Section 4 charges do not apply to like traffic and that no showing is made of any disadvantage or injury to Section 2 traffic or the shippers thereof. "In these circumstances", the Commission found, "any existing deficiency in the Section 4 charges does not relieve Section 2 traffic of the responsibility of bearing the full cost of that service and is not a consideration in the determination of the lawfulness of the increase proposed in the Section 2 charges". The finding is supported by the evidence. Differences in rates and charges as affecting different classes of non-competing shippers or consignees are not per se unjustly discriminatory. We find ourselves in accord with the Commission's position. See *Board of Trade* v. *United States*, 314 U.S. 534, 62 S.Ct. 366, 86 L.Ed. 432, reh. den. 315 U.S. 826, 62 S.Ct. 621, 86 L.Ed. 1222.

On page 17 of their Statement as to Jurisdiction appellants state the question with which these appellees are concerned as follows: Whether the elements for separate charges which are not specifically published in the Perishable Protective Tariff

> ". . . can lawfully be used in authorizing an increase in section 2 charges when in the same proceeding it is affirmatively shown and found by the Commission that none of the same elements (although applicable) are charged, nor any charges nor increased charges therefor proposed, against section 4 traffic."

They urge that the District Court erred in not answering in the negative the question posed and not setting the order aside.

Appellants' contention in that respect is unsound for three reasons. *One*, there can be no discrimination or undue preference at law as between unlike and noncompetitive commodities. *Two*, there is no showing of discrimination in fact in the absence of proof that compensation for all elements of the refrigeration service received by railroads from the stated charges in the case of section-2 traffic is different from the compensation for the same elements of service received when coupled with the line haul rates in the case of section-4 traffic. This difference in the mechanics of payment can in no sense be deemed unjust discrimination or to cause undue preference and prejudice. *Three*, the Commission was not called upon or required to decide, hence this Court cannot review, the question of whether refrigeration services may properly be compensated for, in part, by the line haul rates.

These matters will be dealt with in the order stated.

ARGUMENT

I.

There can be no discrimination or undue preference as between unlike and noncompetitive commodities, or in the absence of proof of injury from the alleged discriminatory charges.

The question with which this motion to affirm is concerned is posed as follows in appellants' Statement as to Jurisdiction (page 6):

> (5) Whether unlawful discrimination, contrary to sections 2 and 3 of the Interstate Commerce Act, exists or is created by a uniform percentage increase in all refrigeration charges, although "section 4" charges (on fresh meats and packing house products) are published for only three elements of cost, and "sec-

> tion 2" charges (on fresh fruits and vegetables) are based on as many as nine elements of cost.

At page 25 of the Statement as to Jurisdiction, appellants say that the Commission's order either created or increased "a discrimination which is declared unlawful by the statute".

Section 2 of the Interstate Commerce Act is limited in its application to different charges maintained as to "a like kind of traffic". Whether section-2 traffic and section-4 traffic are "like" traffic, is a question of fact. On that question the Commission ruled adversely to the appellants, saying at page 505, "the section-2 and section-4 charges do not apply on like traffic . . ." Appellants in their Statement as to Jurisdiction make no claim that there is evidence to contradict the quoted finding. Appellants' claim as to discrimination is without substance. *Barringer & Co.* v. *United States*, 319 U.S. 1, 6 (1943).

Section 3 of the Act prohibits undue preference and prejudice as between persons, localities, traffics, etc. A mere difference in rates assessed upon different traffic is not sufficient to sustain a finding of undue preference and prejudice under section 3. In addition to other essential subsidiary findings, it must appear that the preference of the one traffic causes a corresponding disadvantage or injury to the prejudiced traffic. The Commission finding as to this is explicit, it being stated at page 524 of the report as follows:

> . . . there is no showing that any failure of the section 4 charges to cover the above-mentioned elements has caused, or is likely to cause, any disadvantage or injury to the section 2 traffic or any shippers thereof. * * * In these circumstances, any existing deficiency in the section 4 charges does not relieve section 2 traffic of the responsibility of bearing the full cost of that service and is not a consideration in the determination of the lawfulness of the increase proposed in the section 2 charges.

Here, again, we find no claim in appellants' Statement as to Jurisdiction that there is evidence opposed to the Commission's findings of fact. The District Court found that that finding is supported by the evidence, as indicated by the quotation appearing on page 5 hereof.

The appellants introduced no evidence whatever in the Commission proceeding tending to show any disadvantage or injury by reason of the difference in charges complained of. The Commission's conclusion as to the absence of any section 2 or section 3 violation, proceeds inevitably from that lack of evidence. Appellants' allegations of error with respect to that finding are without either fact or legal support, and present no substantial question.

II.

There is no evidence of a difference in fact between the aggregate compensation received by railroads for refrigeration service on section-2 traffic and section-4 traffic.

Even if the appellants could successfully negotiate the hurdle of establishing that section 2 and section 4 traffic are "like" traffic and that a preference of section 4 traffic somehow causes injury to section 2 traffic, appellants would none the less founder when they attempt to demonstrate that there is, in fact, a difference between the two in the compensation received for similar refrigeration services. The bare fact that the Perishable Protective Tariff does not publish specific charges which provide compensation for ice haulage, etc., as to section 4 traffic, but does as to section 2 traffic, does not prove a *difference*. That is because of the fact that as to section 4 traffic compensation to cover such elements of expense is received from the line haul rates applicable thereto. This fact is recognized in a series of past cases before the Commission and was not challenged by any evidence to the contrary in the instant proceeding before the Commission. See *Perishable Freight Investigation*, 56 I.C.C. 449, 466-467 (entire Comm., 1920); and *Pacific States Butter, Egg, etc. Asso.* v. *Southern P. Co.*,

151 I.C.C. 244, 255 (Div. 4, 1929). In the case last cited the Commission stated at page 255:

> The rates which we have prescribed for dairy products in Official Territory, within and from the southwest, and in other parts of the country east of the Rocky Mountains have been fixed in recognition of the cost-of-ice basis and of the fact that it does not in itself provide compensation for all elements of refrigeration service.

An example of predicating line haul rates on section-4 traffic on certain of the elements of the refrigeration service is *Morrell & Co.* v. *N.Y.C. R.R. Co.*, 104 I.C.C. 104 (entire Comm., 1925), 120 I.C.C 537 (1927) The line haul rate level prescribed in that case constitutes the foundation for the rates on which the preponderance of the fresh meat and packing house traffic presently moves to eastern territory. The report in that case shows that consideration was given the cost of ice-haulage. (See page 116) On page 122 the Commission considered as "entitled to some weight in determining reasonable [line haul] charges" on fresh meat and packing house products the fact that the "rules governing and charges for icing meats . . . [were] more favorable than on other perishable freight".

To the extent that the line haul charges applicable to fresh meat and packing house products have included provision for ice haulage and other refrigeration expenses, it is significant to note that such charges have been increased 88.4 percent since June 30, 1946 (see *Increased Freight Rates, 1956*, 298 I.C.C. 279, 325) while the charges specified in the Perishable Protective Tariff have been subjected to increases of but 32.25 percent (since no increases on such charges were allowed in Ex Parte Nos. 168 or 175).

In *Charges for Protective Service to Perishable Freight*, 215 I.C.C. 684, the Commission did find that it would be proper and lawful to provide in the Perishable Protective Tariff new separately published charges on section-4 traffic

for ice haulage, etc. However, in those reports the Commission recognized that to the extent such charges duplicated compensation provided in the line haul rates, shippers were entitled in an appropriate proceeding to a readjustment to remove the double charge. (215 I.C.C. 797, 241 I.C.C. 503, 241 I.C.C. 515, 253 I.C.C. 531) The validity of those orders was challenged by the packers because the Commission was without power to prescribe proper charges without at the same time making proper adjustment of the line haul rates. The orders in those cases never became effective. First, there was a temporary restraining order, then a postponement at the request of the Office of Price Administration, and finally in 1951 a complete vacation of the order of the Commission upon a recital of changed conditions. As a result, the practice as to section-4 traffic of compensation for ice-haulage, etc., being provided by the line haul rates has never been changed.

In summary, the Commission has uniformly recognized the inclusion in the line haul rates applicable to section-4 traffic of provision for some of the cost of furnishing refrigeration service. Amounts so included have never been specifically determined in any Commission proceeding. Appellants in the instant proceeding introduced no evidence whatever as to that amount, and consequently are wholly unable to establish a difference *in refrigeration charges* as between section-2 and section-4 traffic. Failing in this, the allegations of discrimination and undue preference under sections 2 and 3 of the Interstate Commerce Act are without factual or legal justification.

III.

The Commission was not called upon or required to decide, hence this Court cannot review, the question whether refrigeration services may be compensated for in part by the line haul rates.

All that was before the Commission in the proceeding under review was the lawfulness of certain proposed increases in the various refrigeration charges as specifically

carried in the Perishable Protective Tariff. The Commission was not called upon to determine the lawfulness of providing compensation for the furnishing of part of the refrigeration service out of line haul rates, nor the sufficiency of the amounts so provided for. Consistent with the nature of the proceeding, no evidence whatever was introduced by any party, not even appellants, bearing upon those matters. If the scope of the investigation had included those matters, i.e., if the railroads had proposed to establish separately-designated refrigeration charges for elements of cost theretofore provided for only out of the line haul rates, evidence as to the level of such line haul rates would have been essential to a determination of the lawfulness of such newly published tariff items. In *Perishable Freight Investigation*, 56 I.C.C. 449, 612 (entire Comm., 1920), the Commission held that where such newly published items were proposed, no determination could be had with respect thereto "in default of evidence in regard to the quantum of the line-haul rates". In *Barringer & Co.* v. *United States, supra*, this Court held that the Commission properly considered the level of the through line haul rates in determining whether a related accessorial charge was just and reasonable under section 1 of the Act.

The different method of assessing charges for refrigeration services as between section-2 and section-4 traffic was a practice antedating by many years the institution of the investigation here under review. In footnote 2 on page 7 of their Statement as to Jurisdiction appellants cite a case decided in 1920 (*Perishable Freight Investigation*, 56 I.C.C. 449) where this practice, which was then in effect, was described. Particularly significant is the fact that in Ex Parte No. 162, *Increased Railway Rates, Fares, and Charges, 1946*, 266 I.C.C. 537 (1947), and again in Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I.C.C. 403 (1948), the Commission approved in each proceeding increases in refrigeration charges of 15% on both section-2 and section-4

traffic, exactly the percentage approved here, and no one questioned its authority in those cases. If section-2 shippers consider themselves aggrieved by that difference in manner of publication, they are now, and have been for many years free to bring a complaint proceeding alleging violation of sections 2 and 3 and of any other section of the Interstate Commerce Act. Such a complaint would present squarely the question which appellants seek to have decided in the first instance by this Court in the absence of a determination by the Commission itself in a proceeding embracing that issue. This Court may not properly assume unto itself the authority to determine a question not presented in the issues before the Commission as to which there is no testimony offered and which the Commission has not decided. The initial determination of whether unjust discrimination or undue preference and prejudice exists is committed by Congress to the Commission. In a proper case in which a determination is reached based upon competent evidence of record, this Court would within certain limits pass upon the validity of such determination as the Commission might render. This, however, is not such a case.

CONCLUSION

Appellees respectfully submit that the appellants present no substantial question with respect to their allegation of discrimination and prejudice for decision by this Court, and that the judgment and decree of the District Court should therefore be affirmed.

Respectfully submitted,

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January 26, 1957

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered September 7, 1956, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing an action brought by appellants to set aside an Interstate Commerce Commission order which authorized a general 15% increase in charges by railroads for refrigeration services.

Following World War II, the Commission authorized a number of general overall percentage in-

creases in interstate railroad freight rates. In connection with the first two of such increases, the Commission also authorized percentage increases in charges for refrigeration services.[1] However, in the subsequent general revenue proceedings, the Commission refused to authorize further increases in such charges, on the ground that the carriers had failed to show that existing charges were inadequate. See *Proposed Increased Refrigeration Charges,* 297 I. C. C. 505, 509 (Jur. St. App. II).

The carriers then made a comprehensive cost study of their refrigeration services. In August 1953, on the basis of that study, they filed with the Commission a petition for further increases in charges for such services. After lengthy administrative proceedings, the Commission authorized a general increase of 15% (which was less than the increases proposed by the carriers) and accordingly modified previous outstanding orders so as to permit the establishment of the increase thus authorized.

Although the Commission found (*Proposed Increased Refrigeration Charges, supra,* p. 553) that the cost study had shown "a substantial deficit" (averaging 23%) in total railroad revenues from refrigeration services, it held that the increases proposed by the carriers could not be approved because they would result in "substantial reduction in revenues" through diversion or other loss of traffic (*ibid.*). It concluded that a general increase of 15% in refrigeration

[1] Pursuant to Section 6 (1) of the Interstate Commerce Act, charges for refrigeration services are stated separately from the line-haul rates.

charges would enable the carriers "to provide adequate refrigeration service and specifically to meet increased costs of rendering that service * * *" (*id.*, p. 554).[2] The Commission further stated (*ibid.*) that, after such increases had been made, the carriers "should conduct thorough and comprehensive studies that will permit sound determinations as to the effect of increases upon the movement of traffic, and as to any inequities or improper relations in refrigeration charges that may have developed from changed conditions since their original establishment."

In unanimously sustaining the Commission's order, the district court held (Jur. St. 5a–11a) that the Commission proceeding was a "general revenue" proceeding rather than one to determine the reasonableness of specific rates; that the court therefore would consider only whether "the overall general increases as authorized will be just and reasonable" (Jur. St. 10a), and not the "lawfulness of particular charges" (Jur. St. 9a);[3] and that the Commission's findings were supported by substantial evidence and "afford an adequate basis" for its conclusion that an overall increase of 15% in refrigeration charges was justified (Jur. St. 13a).

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[2] The Commission found (*ibid.*) that a 15% increase would yield "additional annual revenue approximating $6,000,000."

[3] The court pointed out (Jur. St. 13a–16a) that, despite its affirmance of the Commission's order, appellants nevertheless could, by complaint filed under Sections 13 and 15 of the Act, "present to the Commission their contentions that particular rates initiated pursuant to its order were unreasonable and discriminatory" (Jur. St. 8a).

ARGUMENT

1. Appellants contend (Jur. St. 25–36) that the district court refused to "consider the merits of the case" and dismissed the complaint for want of a "justiciable issue" (Jur. St. 4). The court's opinion shows on its face, however, that the court fully considered the validity of the Commission's order (Jur. St. 4a–17a), and dismissed the complaint because it held that the findings were sufficient to support the order and had an adequate evidentiary basis (Jur. St. 13a). Appellants' contention, therefore, is but a restatement of their basic position that the district court erred in treating the Commission proceeding as a "general revenue" case rather than as a "rate" case, and consequently in considering only the propriety of the general increase and in refusing to consider the reasonableness of the application of that increase to individual rates.

We submit, however, that the district court correctly held that this was a "general revenue" case. The application for increased charges was filed by substantially all the nation's railroads, and their comprehensive cost study dealt with the problem in terms of averages for all carriers, not in terms of particular rates. The Commission treated the application as one for a general increase in revenues from an important segment of carrier operations. It stated that the evidence showed "a substantial deficit in the *total of the revenue from refrigeration services,*" and that a 15% increase in charges for refrigeration generally would yield "additional annual revenue approximating $6,000,000" (297 I. C. C. at 553, 554, emphasis

added). Furthermore, the Commission's decision contemplated that the carriers would make additional studies to permit correction of any inequities that might arise out of the application of the increased charges to particular rates (see *supra*, p. 3).

The Commission was fully warranted in dealing with charges for refrigeration services on a nation-wide, and not an individual rate, basis. "Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory." *King* v. *United States*, 344 U. S. 254, 275. The principle is no less applicable because the order deals with charges for refrigeration services rather than "rates and revenues" generally. The Commission had dealt with the problem by general order on two previous occasions, in connection with authorizing general increases in interstate rates (see *supra*, p. 2), pursuant to its settled policy that "the handling of refrigerated traffic should be considered as an integrated national service * * *." *Charges for Protective Service to Perishable Freight*, 215 I. C. C. 684, 730. Indeed, "the administrative arm of the Commission [would be] paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule." *United States* v. *Louisiana*, 290 U. S. 70, 75–76.

2. Since this was a "revenue" case, the district court properly limited itself to determining the validity of the general increase, and refused to consider the effect of such increase upon particular rates. For an order authorizing a general increase in revenues, otherwise valid, does not become invalid because of "possible uncertainty of application in isolated instances * * *. The appropriate remedy under such conditions is an application to the Commission [under Sections 13 and 15] requesting it to suspend the operation of the order insofar as it may affect the isolated cases; and, if necessary, to enter an independent order dealing specifically with them." *Georgia Commission* v. *United States*, 283 U. S. 765, 772; see also *Algoma Coal & Coke Company* v. *United States*, 11 F. Supp. 487 (E. D. Va.).[4]

3. The district court correctly held that the Commission's order authorizing a 15% increase in charges for refrigeration service was supported by adequate findings which, in turn, had substantial evidentiary support.

a. The Commission found that the existing charges produced revenues which were substantially less than the cost of rendering the service, and that a 15% increase, which it estimated would produce additional annual revenue of $6,000,000, would enable the car-

[4] Appellants are not precluded from making such application because of the absence of an explicit Commission finding to that effect. For, as the district court pointed out (Jur. St. 10a), a shipper's right to file such applications, and the Commission's duty to rule upon them, flow from the Act itself, and "[t]he Commission has not, and indeed could not, foreclose the right or renounce the duty in an order authorizing general increases in transportation rates or charges."

riers to provide adequate refrigeration service and to meet the increased costs of rendering that service (see *supra*, pp. 2–3). Those findings were adequate to support the order. "It is not necessary, for general revenue purposes, to establish for each item in each freight rate a fully developed rate case." *King* v. *United States, supra.*

b. In authorizing the increase, the Commission relied primarily upon the carriers' comprehensive and detailed study of the cost of rendering the service. Appellants now challenge this cost study as inadequate to support the order (Jur. St. 35–36). But "[w]hether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact the determination of which is within the competence of the Commission." *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 481; see *New York* v. *United States,* 331 U. S. 284, 328. The district court fully reviewed appellants' attacks on the adequacy of the cost study as a basis for the order, pointed out that the Commission "found a vast multitude of specific facts" (Jur. St. 12a) which "afford an adequate basis for the Commission's conclusions" (Jur. St. 13a), and concluded that such factual findings were "supported by substantial evidence" (*ibid.*).

This Court has indicated that the initial reviewing court has "primary responsibility" (*National Labor Relations Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498, 502) for determining "[w]hether on the record as a whole there is substantial evidence to support agency

findings," and that it will re-examine the record only in the "rare instance" where the reviewing court has "misapprehended or grossly misapplied" the governing criteria. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491. We submit that there are no special circumstances here which would warrant a further canvassing of the record. See *New England Divisions Case,* 261 U. S. 184, 203–204; *Radio Corp.* v. *United States,* 341 U. S. 412, 415.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should therefore be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, CALIFORNIA CITRUS LEAGUE, WESTERN GROWERS ASSOCIATION, *et al., Appellants,*

v.

UNITED STATES OF AMERICA, *et al., Appellees.*

Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM BY (a) UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION (b) RAILROAD APPELLEES, AND (c) ARMOUR AND COMPANY, ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 663

FLORIDA CITRUS COMMISSION, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees*.

Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division

---

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM FILED BY (a) UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION (b) THE RAILROAD APPELLEES, AND (c) THE MEAT PACKERS, ARMOUR AND COMPANY, ET AL.

This Appellant's brief in opposition to the three motions to affirm, is filed on behalf of the citrus and vegetable industries of Florida and California, the principal users in the nation of the "stated charge" or "section 2" refrigeration services. These Section

2 charges are the ones which are detrimentally affected by the order of the Interstate Commerce Commission in its Docket No. 31342, whereby long outstanding orders were set aside and a uniform nation-wide increase of 15% in all refrigeration charges was authorized and became effective.

Refrigeration or icing service is transportation; but such service is merely an auxiliary or accessorial one. The statute contemplates that the "icing charges" shall be stated in the tariff "separately" from the primary or line-haul transportation charges (49 U.S.C.A. Sec. 6 (1)). Since the extensive investigations by the Interstate Commerce Commission in Dockets 17936 and 20769,[1] the separation of refrigeration charges from line-haul rates has been required, and the specific elements of cost of refrigeration service were and are plainly stated, such elements being applicable according to the particular service requirements.[2] The term "cost" as applied to refrigeration

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[1] Docket 17936, *Refrigeration Charges on Fruits, etc. from the South*, 151 I.C.C. 649, decided Feb. 12, 1929. Docket 20769, *Charges for Protective Service to Perishable Freight*, 215 I.C.C. 684, decided June 2, 1936.

[2] 215 I.C.C. 797: "In the *Southeastern case* we found that in addition to the cost of ice, the refrigeration charge should include the cost of switching, haulage of ice, bunker repairs, supervision, and hazard. We have found the cost of these elements, also the cost of station and auditors accounting, to be proper charges in this case, and have set forth in preceding chapters of this report the cost per car, per ton, per icing, or per ton-mile, of each element. These costs have been taken into consideration in arriving at the specific Section 2 charges herein prescribed. Charges to cover these costs, except the cost of hazard, should be published in Section 4 for appropriate application to shipments moving under that section."

See also footnote 7, page 13 Statement as to Jurisdiction, quoting the finding thereon in the Docket 31342 report.

service and rates includes interest or a return on investment in all capital assets used in furnishing such service.

Thus, while the Perishable Protective Tariff publishes "Section 2" refrigeration charges in connection with fresh fruits and vegetables, berries, melons, and processed foods and "Section 4" refrigeration charges for all other commodities such as fresh meats and packinghouse products, the elements of cost for performing the icing service are exactly the same. As was said by the Commission in the instant proceeding, 297 I.C.C. 505, 506-507:

> "The prescribed charges were predicated on the determination that they should be sufficient to cover the cost thereof plus a fair return on the investment in facilities required for the performance of the services. Being accessorial to the basic line-haul service, these charges were prescribed as exact charges, necessary to cover the additional cost incurred by the carriers in performing the services. Also set forth were unit cost of the several elements that had been recognized as contributing to the cost of rendering refrigeration service, in connection with which it was concluded that the application of such of those unit costs as might be pertinent to the particular class of service used would indicate the proper charge."

The proper charge for one refrigeration service differs from charges for other such services only because different elements of service are involved. The amount of the cost of each element of service is identical regardless of the type of refrigeration service to which the particular element is applicable. But with the variations in the number of character of elements of service performed in each different type of

refrigeration service, the total cost of a particular service varies from that of another and the charges must necessarily vary according to such variations of total cost. "The charges for the various refrigeration services differ widely dependent upon the character of the service rendered" (297 I.C.C. 508). The range of the charges is "from about 15 to 85 percent of the charge for standard refrigeration between the same points." "There are about six different sets of charges" (for standard refrigeration service) "dependent partly upon the commodity involved." (297 I.C.C. 508).

Different amounts are charged for standard refrigeration service on apples, citrus fruits (iced after being loaded), citrus fruits (in pre-iced cars), deciduous fruits, melons, and vegetables (see Table on page 791 of 215 I.C.C. Lesser amounts are charged for lesser service. Rule 240, initial ice—do not re-ice—provides one charge if the shipper furnishes the initial ice, and a higher charge if the ice be furnished by the carriers. Rules 242 and 243 provide a charge for "top or body icing service" with the ice being furnished by the shipper. The four variables are the commodity, the origin, the destination, and the type of refrigeration service rendered.

NATURE AND CHARACTER OF PROCEEDING BEFORE COMMISSION

Docket 31342, *Proposed Increased Refrigeration Charges*, 297 I.C.C. 505, in which the assailed order of January 9, 1956, was entered, was an entirely different proceeding, in every respect, from the "general revenue" proceedings.

The Railroad petition, filed under Section 13 of the Interstate Commerce Act, prayed that the Commis-

sion "institute an investigation" and "determine and find that the increased charges here proposed will be just and reasonable" (see pages 10, 11 Statement as to Jurisdiction), and the substance and effect of the consequent proceedings, report and order of the Commission clearly made Docket 31342 a rate case, as distinguished from a general revenue case.

The Railroad petition set forth their initial proposal.[3] "Generally, the proposal was to increase by 30 percent, with certain exceptions, the charges published in Section 2 of the perishable Protective Tariff, . . . and to increase by specified amounts the charges published in Section 4 of the same tariff" (pages 3-4, Railroads' Motion to Affirm). The latter part of the proposal is important, a proposal to increase charges for ice in California, for example, from $4.04 to $5.07 per ton and in Florida from $5.49 to $5.72 per ton. The Commission denied both, disallowing the 30% and disapproving the specific increases in charges per ton of ice, but substituting a substantial increase of 15% applying uniformly on all of the refrigeration services regardless of cost.

At the outset of the hearings, counsel for the Railroads specifically disclaimed all contention that the proceeding was a general revenue case.[4]

The Commission found "that the application of such of those unit costs as might be pertinent to the particular class of service used would indicate the proper charge," (297 I.C.C. 507), and ignored that

[3] Set forth in detail in Appendix A to the Commission's report, 297 I.C.C. 556-557—Appendix II to Statement as to Jurisdiction.

[4] R. 271: "Mr. Bierma (counsel for railroads): We don't view this as a general revenue case, Mr. Examiner."

finding in concluding that a uniform nation-wide increase of 15% was authorized as to charges for all services alike.

It found that refrigeration charges should "cover the additional cost incurred by the carriers in performing the services" (297 I.C.C. 507); such return of full cost not being the same but entirely different from a general revenue case.

It found: "The charges for the various refrigeration services differ widely dependent upon the character of the service rendered" (297 I.C.C. 508); but disregarded that finding.

It found that the "petitioners' traffic study" embraced only "shipments accorded bunker re-icing service" (297 I.C.C. 511) and that none of the other shipments such as rules 240, 242 and 243 ("which approximated 43 percent of the total"—297 I.C.C. 518) were included, but disregarded that basic fact and authorized the application of the 15% increase, derived from the bunker re-icing traffic study, also to services having no bunker re-icing nor any icing whatever by the carriers.[5]

It found as to the bunker re-iced shipments in the traffic study that the railroad computed deficits varied as to different services—30.6%, 24.1%, 12.2%, 33.7%, 7.2%, 12.3%, 6.7%, 22.1%, 23.6%—and as between commodities "ranges from a minimum of 12.75 percent for apples to a maximum of 76.77 percent for frozen foods" (297 I.C.C. 517); but, after finding that

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[5] As shown by the footnote, page 21 Statement as to Jurisdiction, 55.97% of vegetables from Florida moved under Rule 240 or Rule 243.

the Railroad computed costs were too high, refused to give effect to the wide differences between commodities and between services and authorized a uniform percentage increase thereby charging high cost services and commodities less than cost and penalizing the low cost ones for the benefit and advantage of the high cost ones. It found that "the revenue deficit estimated by petitioners, in the rendition" of half-stage refrigeration service was 44.8 percent, "relatively greater than that incurred in connection with any of the other services" (297 I.C.C. 519); but authorized a uniform percentage increase for application to all services alike, regardless of origin, length of haul, commodity, type of service, etc.

It restated the cost of ice per ton, by "groups," group 1—California, group 4—Florida, group 10—including Texas (297 I.C.C. 532); but authorized greater charges than the restated cost in each of such three groups, the higher charges resulting because of the application of a uniform percentage increase.[6]

It found the cost of salt to be $1.04 per 100 pounds (297 I.C.C. 533); and authorized an increase from 99¢ to $1.04 (or 5.05%) on Section 4 charges therefor, but an increase of 15% on Section 2 charges.

It found: "The evidence presented is insufficient to permit a determination of accurate costs (of switching) prerequisite to the authorization of the specified

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[6] The departure from the established norm is not explained. 215 I.C.C. 731: "Costs in Florida are lower than in other southern states, except South Carolina, and it is considered proper to give the shippers who initiate a large volume of traffic in that state the full benefit of their location, in the same manner as proposed with respect to California." That principle enunciated in 1936 in Docket 20769 is destroyed in Docket 31342, even though the standards of the Act support the Docket 20769 principle.

charges proposed" (297 I.C.C. 535); but authorized an increase of 15% in Section 4 switching charges, and in the restatement of costs on the Section 2 traffic study used "the prescribed charges plus the cumulative increases"—a percentage increase of 46% for Section 2 in contrast with 15% for Section 4.[7]

The Commission found: "The Section 2 charges, as noted, cover the several enumerated elements of expense, while the Section 4 charges cover only the elements of ice, salt, and switching. The elements of expense for supervision, station and auditors accounting, and ice haulage, which are covered by the Section 2 charges, but not included in the Section 4 charges, amount to about 19 percent thereof." (297 I.C.C. 523). It also found: "After extensive investigations in the prior proceedings, we made definite determinations as to the costs of the several elements of expense and required the establishment of charges accessorial to the line-haul rates to compensate those costs on both Section 2 and Section 4 traffic" (297 I.C.C. 524).

The Commission made findings as to the increased cost of supervision (297 I.C.C. 536), haulage of ice (297 I.C.C. 539), and Station and auditor's accounting (297 I.C.C. 540).[8] Such increased cost factors

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[7] The footnote, page 18, Railroads' Motion to Affirm attempts to mitigate the result, by concluding that Section 2 charges were only increased 15% in contrast to 23.9% loss computed by use of 46% increase in the switching factor. If the 46% be reduced in the relation that 23.9 bears to 15, it still remains that Section 2 switching would be increased 29.13% instead of the 15% increase for Section 4 switching charges.

[8] "There is insufficient cost data to justify any charge for this element of expense (station and auditors accounting cost) in excess of the prescribed charge plus the cumulative increases authorized for general application on other traffic."

were used in arriving at estimates of total computed cost on bunker re-iced Section 2 traffic. The Commission, without any further explanation, then concluded to authorize an increase of the same percentage on section 2 and section 4 charges although no charges for those factors were required for section 4 services.

The Commission purported to state the "cost" of ice computed by petitioners for the sample Section 2 bunker re-iced shipments, it then made an "adjustment" thereto and to certain other elements, and arrived at an "adjusted cost" (297 I.C.C. 543). "The ice-cost formula is (was) designed to develop at each icing station the cost of" ice, including "such elements as return on investment, depreciation, interest on working capital, cost of transporting ice to platforms, labor of icing cars, indirect costs, and taxes" (297 I.C.C. 526). That "cost" of ice at "each icing station" ("more than 2,000 reports" 297 I.C.C. 511) was not used in any computation of costs for any Section 2 traffic. On the contrary, group averages for ice costs were employed by the carriers and the Commission (297 I.C.C. 512 and 543).[9]

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[9] See footnote 11, page 20, Statement as to Jurisdiction. The mere difference in method, i.e. using group averages embracing States as far removed geographically from each other as Mississippi and Maine, Maryland and Michigan, instead of the actual, average cost of ice furnished at particular icing stations, produces widely variant results.

Railroad average cost for group 8	$7.03
Commission restated average-group 8	6.91
Railroad average, all stations in Virginia	5.87
Railroad average for Potomac yard Virginia	4.83

Thus for ice furnished at Potomac Yard, Virginia, at an actual average cost of $4.83 per ton, the railroads' computation used the "group average of $7.03."

To the extent that the evidence received by the Commission was adequate to prove anything, it covered the individual elements of cost and the specific re-icing services by commodities and territorial groups. The Commission made findings with respect to the individual elements of cost. Then instead of making findings with respect to appropriate rates for specific services, it ignored its findings as to elements of cost and the evidence as to specific services and allowed a 15% increase in all rates. It now seeks to justify that conclusion on the ground that the proceeding was a general revenue case.

All of the evidence and all of the Commission's findings with respect to the elements of cost were appropriate in and characteristic of a rate case—not a general revenue case. For the latter the usual evidence is a showing of financial condition of the carriers and their revenue needs. No evidence whatever of this character was presented to the Commission. It made no findings with respect to financial condition or revenue needs of either the carriers or the carlines, the latter being the primary beneficiaries of all refrigeration rates. Obviously the total refrigeration traffic furnishes such a small segment of total freight revenue (less than ½ of 1 percent) that an increase in refrigeration could not possibly have a significant effect upon the financial conditions or the revenue needs of the carriers as a whole.

Thus the present proceeding before the Commission, in its pleadings, in the character of evidence presented, in the nature of the findings made by the Commission and in the effect of the decision upon the rates involved, was a rate case and not a general revenue case.

THE DISTRICT COURT DECISION

The complaint seeking to enjoin, annul, and set aside the Commission's order was dismissed, *Florida Citrus Commission et al.* v. *United States, et al.*, 144 F. Supp. 517, because of reliance by the three judge court upon an erroneous conception of the nature, substance and effect of the Commission's order.

It is conceded by the Motions to Affirm that "the district court held (Jur. St. 5a-11a) that the Commission's proceeding was a 'general revenue' proceeding rather than one to determine the reasonableness of specific rates" (U.S.-I.C.C. Motion p. 3); that the appellants' contention is "that the district court erred in treating the Commission proceeding as a 'general revenue' case rather than as a 'rate' case, and consequently in considering only the propriety of the general increase and in refusing to consider the reasonableness of the application of that increase to individual rates" (U.S.-I.C.C. Motion p. 4); that the district court "held that this was a 'general revenue' case" (Ibid. p. 4), and that (on the erroneous assumption that "this was a 'revenue' case") the district court "limited itself to determining the validity of the general increase, and refused to consider the effect of such increase upon particular rates" (Ibid, p. 6).

Likewise, the Railroads' Motion to Affirm concedes that the District Court held that "the proceeding before the Commission was a general revenue proceeding; that the Commission's order was permissive in character; that the lawfulness of individual charges was not considered or decided" (Railroads' Motion p. 7). Also, the Railroad's Motion (p. 8) reiterates their position "that the Commission's order is permissive only" and the fact "that the Commission did

not pass upon the lawfulness or reasonableness of individual charges for any specific type or character of refrigeration service."

That these are substantial questions, entitling appellants to judicial review, is clearly shown by the Jurisdictional Statement and by what is set forth in this brief as to the specific findings and conclusions in the Commission's report. Those show affirmatively that the performance of its duty under the law required the Commission to deny a uniform percentage increase, and to conclude that the increased charges for various type of services above the actual cost thereof should have been denied.[10]

The district court's decision is not susceptible to any construction that it "fully considered the validity of the Commission's order" nor that it "held that the findings were sufficient to support the order and had an adequate evidentiary basis" (U.S. I.C.C. Motion p. 4). Neither is the Railroads' contention (R.R. Motion p. 6) correct that the district court did not fail "to consider the merits of the case."

What is said in the district court's opinion must be read in the light of its erroneous views that this is a "general revenue" case and that "typical evidence justifying general findings" was before the Commission and spelled out in the Commission report. It is true that the district court prefaced its discussion (p.

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[10] "This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the day to come." *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U. S. 499, 79 L. ed. 1023.

11a, Appendix I to Statement as to Jurisdiction) with the following language:

> "We come now to the contention of the plaintiffs that *if we should hold this to be a case governed by the doctrines of the general revenue cases*, and we do so hold, nevertheless the evidence does not show nor the findings support the Commission's conclusions or warrant the entry of its order." (Emphasis supplied)

On the question of discrimination between Section 2 and Section 4 charges for refrigeration, the district court said (p. 13a, Appendix I to Jur. St.):

> "It is true that Section 4 charges reflect only the cost of ice and salt, and the cost of switching, while Section 2 charges include also ice haulage, bunker damage, supervision and other elements. If there be any discrimination between Section 2 and Section 4 traffic, and *this we do not decide*, it is a discrimination which existed prior to the proceedings before the Commission whence issued the order under attack. Such discrimination, if any there be, did not result from nor was it substantially altered by the Commission's order." (Emphasis supplied.)

The district court thus, as shown by its own language, failed to determine whether there was discrimination contrary to Sections 2 and 3 of the Act. It overlooked the facts, found by the Commission's report, that three of the factors excluded from Section 4 charges constitute 19% of the Section 2 costs, that "it is not apparent that the unit costs of providing the individual elements of service are different for the various services," (297 I.C.C. 519), and that the entire discrimination has not heretofore existed but is enhanced and increased by the Commission's order. The

elements of supervision, haulage of ice, station and auditor's accounting, etc., are *increased* by the order as to Section 2 charges, whereas Section 4 charges under the same order will continue without any charge therefor.

The Commission erroneously concluded "that the Section 2 and Section 4 charges do not apply on like traffic" (297 I.C.C. 524). See *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 74 S. Ct. 826, 98 L. Ed. 1015; and *Seaboard Air Line Ry. Co.* v. *United States*, 254 U.S. 57, 65 L. ed. 129.[11]

It was affirmatively said by the Commission in its report (297 I.C.C. 524):

> "After extensive investigations in the prior proceedings, we made definite determinations as to the costs of the several elements of expense and required the establishment of charges accessorial to the line-haul rates to compensate those costs on both Section 2 and Section 4 traffic."[12]

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[11] 254 U.S. 57, 62: "We are of the opinion that the Commission was correct in regarding the service in question as a like and contemporaneous service rendered under substantially similar circumstances and conditions. * * * The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions."

[12] The contention in the Meat Packers Motion to Affirm that line-haul rates include some amount for compensating refrigeration costs against Section 4 traffic exists only in the argument of counsel. It is not only not supported by any findings in the Commission's report in Docket 31342 but also is directly contrary to affirmative findings in Docket 20796, 241 I.C.C. 503 and 253 I.C.C. 351. The principle followed by the Commission, in conformity with the law, was stated in the original report in Docket 20769, 215 I.C.C. 684, 796, in the following language: "It is wholly impracticable to include in line-haul rates specific amounts to cover refrigeration costs. The identity of whatever amount that might

The district court correctly said (Statement as to Jurisdiction, 16a-App. I): "It has been settled that the Interstate Commerce Commission is without power to award reparations with respect to shipments which moved under rates approved or prescribed by it. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. ed. 348." The non-applicability of that principle was determined by the district court on its erroneous assumption that this is a "general revenue case" and the order merely a permissive one—see page 23 Jur. St.

Appellants have not contended that the Interstate Commerce Commission cannot "deal generally with rates and revenues in a large area on evidence typical of the area as a whole" or "on evidence deemed typical of the whole rate structure" (U.S.-I.C.C. Motion p. 5). However, in the case at bar, the traffic study of bunker re-iced shipments only cannot possibly be said to be typical of refrigerated shipments which do not involve bunker re-icing nor any icing at all by the railroads. Furthermore, average costs of ice in a large group cannot be accepted as typical or lawful substitutes for costs of ice furnished in a specific service.[13]

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in the first instance be included in a line-haul rate to cover refrigeration service would sooner or later be lost in the inevitable readjustments to which line-haul rates are subject. Doubtless this has occurred to a greater or lesser extent wherever an attempt has been made to so handle such costs in the past, with consequent loss to the carriers and undue advantage to shippers who have used Section 4 service as compared with shippers who were under the necessity of using Section 2 service."

[13] In *Brimstone Railroad & Canal Co.* v. *United States*, 276 U.S. 104, 72 L. Ed. 487, quotation with approval was made from a former decision: "Evidence of individual rates or divisions, said to be typical of all, affords a basis for finding as to any one. But averages are apt to be misleading. * * * but it was not proper to

ADMINISTRATIVE NECESSITIES

Great emphasis is laid, in the Motions to Affirm by United States Interstate Commerce Commission and by the Railroad appellees, upon the doctrine of administrative necessities, which when properly applied permits the adjudication of issues, involving a multitude of details, upon evidence, deemed typical of the whole.[14]

So far as has come to our knowledge, there has never been a decision of this Court extending the doctrine to a case such as the one at bar—far beyond the original scope and applicability of the rule. The doctrine is not a substitute for evidence, nor does it authorize, contrary to the mandate of the Interstate Commerce Act, that rates and charges shall be just and reasonable

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accept them (aggregate results) as a substitute for typical evidence as to the individual joint rates and divisions."

See also, *Northern Pac.* v. *Department Public Works*, 268 U.S. 39.

[14] *New England Divisions Case*, 261 U.S. 184, 197-199: "For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. * * * It was the actual necessities of procedure and administration which had led to the adoption of that method in passing upon the reasonableness of proposed rate increases. * * * That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions. * * * It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed."

and non-discriminatory, the approval of blanket increases to all rates and charges of a particular class in the face of evidence and findings to the contrary. Evidence of a traffic sample intentionally restricted to certain "bunker re-iced" shipments cannot possibly be assumed to be typical of the substantial volume (43% nationwide, and nearly 56% in Florida) of Rule 240 and Rules 242-243 refrigerated shipments for which there is no bunker re-icing and in fact no icing whatever by the carrier. (On bunker re-iced shipments, the "cost of ice" is approximately 63% of the total cost.)

Neither is there any justification for accepting widespread area or "group" averages as being identical with or typical of costs actually incurred, particularly when it affirmatively appears that the actual cost at particular stations is vastly different from the average for the entire "group" in which that station happens arbitrarily to be located.

In *United States* v. *Louisiana*, 290 U.S. 70, 77, 78 L. ed. 181, this Court approved the Commission's "exercise of its power to prescribe reasonable rates," it having been done "in conformity to the administrative necessities." There, however, there was "an acute emergency calling for prompt action" and the ultimate finding was "accompanied by suitable reservation of the right of all interested parties to secure modification of any particular rate, which, when challenged, is found unjust or unreasonable." In the case at bar, there was no such reservation, and, to the contrary, when the invalidity of particular increased rates was pointed out by petitions for reconsideration they were summarily denied even before the time for reply thereto had expired.

In the *Louisiana Case*, it was specifically pointed out that the "natural construction" of Sec. 15a(2) of the Act makes "possible its practical operation," but the section "does not relieve the Commission from the responsibility of seeing to it that the rates as increased are to be reasonable." (p. 76).

How possibly can it be said, for example, that the tariff "Section 4" charges for ice in Florida and California, as increased by the authorized 15%, are just and reasonable, when the Commission's own finding and "restated cost" is admittedly less than such increased charges?

Of course, "the extent of this inquiry and the detail of investigation cannot be marked by this Court with certainty." The standards for measurement were set forth by the Court and readily can be and must be followed, viz: "The size of the group dealt with, the nature of the traffic, the urgency of the relief demanded, these and other factors should condition the Commission's procedure in each case." *Louisiana* v. *U. S., supra,* at p. 77.

The nature of the procedure to be followed is not subject to speculation or conjecture, but is the procedure followed in every former case involving refrigeration charges for nearly thirty years. It is simple and practical, and calculated to do justice to both shippers and carriers. It consists merely of a proper determination of the amounts of the unit costs of the various elements of service in refrigeration charges, and secondly the application of those unit costs to such service elements as are involved in a particular type of refrigeration service. The principle was stated in this proceeding (297 I.C.C. 507), as follows:

"The application of such of those unit costs as might be pertinent to the particular class of service used would indicate the proper charge."

The procedure is not new. It was used by the Commission in Docket 17936, 151 I.C.C. 649, decided February 12, 1929. There, the Commission prescribed standard refrigeration charges separately on citrus fruits and vegetables from Florida, on fruits, vegetables, berries and melons from Georgia, on fruits, berries and melons from South Carolina, on vegetables from South Carolina, on berries from North Carolina, on vegetables and melons from North Carolina, on fruits from North Carolina, and on fruits, berries, vegetables and melons from certain points in Virginia, to specified destinations. Each level of charges was designed to reflect the cost, as there ascertained, of the particular service. There were "limitations of the record," which "was largely confined to standard refrigeration service and to traffic moving through Potomac Yard and Norfolk," and therefore the Commission properly restricted its findings "to charges for such service from the origin territory involved to destinations in trunkline and New England territories" (151 I.C.C. 695). Then, the Commission further said:

"However, it will not be difficult for respondents to readjust their charges for other forms of refrigeration service and to destinations in central territory in line with these findings, and this should be done. In this connection it should be noted that the factors which we have arrived at for bunker repairs, supervision, hazard or risk, taxes, and profit are factors which were based upon data covering the operations of the express company in general, and hence they may be applied without change to traffic destined to central-territory points. This is not true of the factors

> for cost of ice, haulage of ice, and switching, but respondents can obtain the data necessary for the adjustment of these factors to traffic other than that covered by our findings."

In a similar manner, and by comparable procedure, the Commission in Docket 20769, *Charges for Protective Service to Perishable Freight*, 215 I.C.C. 684, (a) determined and set forth the cost of the several elements entering into the furnishing of refrigeration service throughout the country, (b) prescribed reasonable charges for standard refrigeration service on apples, citrus fruits, deciduous fruits, melons, and vegetables from Arizona and California to destinations in the Denver, Colorado group and to destinations in specified groups east thereof, (c) indicated the basis for such charges to other destination territory, (d) prescribed reasonable charges under Rules 240, 242, 245, 247 and 249, where applicable, to certain territory, (e) directed that the indicated unit costs be applied by carriers to arrive at charges to other destinations, and (f) required that charges for service under Section 4 of the tariff be the full cost of furnishing that service.

Thus, it is obvious from the actual experience of Dockets 17936 and 20769 that the simple and practical procedure there followed operates to produce reasonable and lawful results.

In addition, it is obvious too that a refrigeration rate structure which initially varied in level or amount depending upon the commodity, the origin, the destination, and the type of service, cannot be increased by a uniform percentage—particularly when it is shown that there are widely different relationships today between the present day costs and the tariff charges pro-

posed to be increased. More accurately, it should be said that a uniform percentage cannot possibly be applied to such varying charges, if the transportation standards of the Act are to be observed. This conclusion is what is expressed in somewhat different language in the dissenting opinion of Commissioner (now Chairman) Clarke, 297 I.C.C. 555-556.

CONCLUSION

The increased "section 2" refrigeration charges involved here affect all fresh fruits and vegetables and frozen foods throughout the United States. Of course, some such traffic is accorded ventilation or heater service during certain seasons of the year, but the great bulk of it moves under refrigeration (297 I.C.C. 509). After naming the protestants who participated in the hearings before the Commission, the report shows (297 I.C.C. 522):

> "This representation embraces practically all the growers, shippers and processors of fruits, fruit juices and concentrates, vegetables, and frozen foods in Florida, Texas, Arizona, California, Oregon, and Washington. . . . "

In short, they are the parties who are denied the use of more favorable "section 4" refrigeration services, accorded to the Meat Packers. They are the ones, who, as a result of the Commission's order, are subjected "to damage which is substantial, immediate and irreparable." "The order is final, not tentative." "It was entered as the result of a formal controversy." "It marked the disposition of the controversy, not a preliminary stage."[15]

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[15] Quotations from *Alton Railroad* v. *United States*, 287 U.S. 229, 77 L. ed. 275.

No doubt, even after making the findings, determinations and declarations set forth in its report, it may have been simpler and "more convenient" for the Commission to evade tailoring its order to fit its findings and the several section 2 refrigeration charges and services separately and consequently merely to authorize a blanket, uniform increase applicable alike to all services and charges, regardless of relationship to unit costs found by the Commission and despite the fact that the resultant charges would be greater in many instances than total cost. However, "the convenience of the Commission or court is not the measure of justice." *Interstate Commerce Commission* v. *Stickney*, 215 U.S. 98, 54 L. ed. 112.

The order here assailed differs essentially from all those held by this Court to be not subject to judicial review. It was not "merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees," nor was it "merely preparation for possible action in some proceeding which may be instituted in the future"—as in *United States* v. *Los Angeles & S.L.R. Co.*, 273 U.S. 299, 71 L. ed. 651.

The order granted authority, and the Commission's report (made a part of the order) determined rights and obligations. The Commission's action was followed by legal consequences. It is reviewable under the principles enunciated in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 130, 83 L. ed. 1147.

The plaintiffs' (Appellants') rights are affected immediately, and are not contingent upon "future ad-

ministrative action." The order was an exercise, by the Commission, "of the delegated legislative function of rate making and rule making." "Here the Commission exercised its (rate-making and) rule-making power by" entering the order "whose operation is not made subject to future administrative determination." The order's "applicability to all who are within its terms does not depend upon future administrative action." Instead it operates "to control such action and to determine in advance the rights of others affected by it." The order is "the effective implement by which the injury complained of is wrought." The order definitely determined and fixed the amounts of the unit costs of elements entering into the construction of refrigeration charges, failed to apply the unit costs thus determined, and disregarded their applicability to the separate, several and different refrigeration services and charges. (Quotations taken from *Columbia System* v. *U. S.*, 316 U.S. 407, 418-420).[16]

The district court erroneously held, and appellees continue to argue, that the order is not reviewable because, they say, it is a "permissive" one. Regardless of the fact that the ancient distinction between an "affirmative" and a "negative" order no longer con-

[16] To maintain the action in the three-judge district court, "it is enough that, by setting the controlling standards for the Commission's action, the regulations purport to alter and affect adversely appellant's contractual rights and business relations * * *. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 422, 425; 86 L. ed. 1563.

trols, it is respectfully submitted that "here the order complained of is an affirmative one. That is, it grants the relief sought." *Chicago Junction Case* (*Baltimore & O. R. Co.* v. *United States*), 264 U.S. 258, 264, 68 L. ed. 667. (p. 263):

> "Rate orders are clearly legislative. * * * Nor would the further fact that the order is permissive preclude review, if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited."

Clearly, a hearing by the Commission was prayed for by the Railroads' petition, and thereupon required by the Interstate Commerce Act. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it." (264 U.S. 265)

See, also, pages 30-33, Statement as to Jurisdiction.

Substantial questions as to the validity of the authorized charges under sections 1, 2 and 3 of the Act are presented by the complaint to the district court and by this appeal. Not only are some, at the least, of the approved "section 2" increased refrigeration charges grossly unjust and unreasonable, but also the increased charges resulting from the Commission's order violates the basic intent and purpose of the Interstate Commerce Act—and prejudices between commodities, services, shippers, regions, and territories.

> "Congress, by adding those words 'region, district, territory' to sec. 3(1), made plain the duty of the Commission in determining whether discriminatory practices exist, to consider the interest of regions, districts, and territories, and to eliminate territorial conditions. * * * As we said

earlier, sec. 3(1) does not dictate a policy of national uniformity in rates: it only requires that the lack of uniformity in rates among and between territories be justified by territorial conditions." *New York* v. *United States,* 331 U.S. 284, 300, 350; 91 L. ed. 1492.

It is respectfully submitted that the Commission's order of January 9, 1956, in Docket 31342, is a "justifiable" one, reviewable by the districts courts under 28 U.S. Code sec. 1336, and presents such additional substantial questions indicating the invalidity of such order affecting detrimentally the entire fresh fruit and vegetable industries of our nation, as to warrant the denial of Motions to Affirm and the noting of probable jurisdiction.

Respectfully submitted,

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February 19, 1957

No. 663. FLORIDA CITRUS COMMISSION ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Florida. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *M. W. Wells, Lewis W. Petteway, R. Y. Patterson, Jr., Karl D. Loos* and *Frank C. Brooks* for appellants. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Robert W. Ginnane* and *Charlie H. Johns* for the United States and the Interstate Commerce Commission, *Roland J. Lehman, Robert H. Bierma, John H. Colgren, Alfred S. Knowlton, D. Fred McMullen, Russell L. Frink* and *Harold B. Wahl* for the Atlantic Coast Line Railroad Co. et al., *Warren H. Wagner* for George A. Hormel & Co. et al., and *Nuel D. Belnap* for Armour & Co. et al., appellees. Reported below: 144 F. Supp. 517.

Miscellaneous Orders.

Pursuant to the provisions of Title 28, U. S. C., § 42, It is ordered that MR. JUSTICE BURTON be, and he is hereby, temporarily assigned to the Sixth Circuit as Circuit Justice.